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No. _____

In The

Supreme Court of the United States

WILLIAM B. GOODHEART, M.D.,

Petitioner,

vs.

FRANK DUMONT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a physician, hired as an independent contractor by county government and fully indemnified by the county, is entitled to assert the defense of qualified immunity in a Section 1983 suit arising out of the performance of his duties for the county in public welfare eligibility proceedings.

2. If so, whether the physician is entitled to qualified immunity from a Section 1983 suit alleging violation of the Fourteenth Amendment right to informational privacy arising out of the county's disclosure of a public assistance applicant's confidential information to interested third parties such as the applicant's treating physicians and other public welfare agencies.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS ENTERED IN CASE

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 126 Fed.Appx. 427. The opinion of the district court (App., *infra*, 3a-9a) denying summary judgment is unreported. The three previous opinions of the district court entered in conjunction with this issue (App., *infra*, 10a-13a; 14a-39a; 40a-62a) are unreported.

JURISDICTION

The judgment of the United States Court of Appeal for the Ninth Circuit was entered on April 20, 2005 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, sec. 1.

Section 42 U.S.C. section 1983 provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law . . . " 42 U.S.C. §1983.

STATEMENT OF THE CASE

This case presents the important, recurring issue of whether a physician hired by the government as an independent contractor to perform essential government activities, with full indemnification by the government, is entitled to assert qualified immunity as a defense to suit under 42 U.S.C. §1983. This issue is important because it affects the ability of government entities to offer indemnity to their individual contractors as an incentive to enter into public service at reasonable rates.

A. Petitioner's Contractual Relationship With Local Government

Petitioner, William B. Goodheart, M.D. ("Goodheart"), an experienced licensed psychiatrist, was hired as an independent contractor by the Marin County Department of Health and Human Services ("the County") to perform psychiatric evaluations of persons applying for public assistance from the Marin County General Assistance program. Goodheart's duties under the contract included providing the County with written opinions on applicants' psychiatric capacity for employment and job training, making recommendations for drug treatment, and providing

consultation services to County eligibility staff as necessary on psychiatric issues (ER 76-86).[1]

During the relevant time frame in 1998, Goodheart had been the County's only psychiatric evaluator for over eight years. The County provided Goodheart with an office, support staff, supplies, equipment, and mileage reimbursement for purposes of conducting his work for the County. Goodheart participated in County staff meetings on a regular basis and was considered to be a valued member of the County's general assistance team (ER 11, ¶8; ER 225). The large majority of Goodheart's professional time was devoted to working for the County. Although Goodheart also maintained a small private office as a sole practitioner, he was only available one day per week for private patients (ER 229, 23-25). Goodheart was not affiliated with any organized physicians' group or other private entity.

Pursuant to the terms of his contract, Goodheart was paid by the County $76.00 per hour up to a yearly maximum of $78,000.00. Goodheart limited his billing to 16 hours per week so as not to exceed the $78,000.00 limit, but he actually worked many more hours than he billed in order to meet the County's needs (ER 221). Goodheart's contract required the County to indemnify and defend him from any risk of liability arising out of his work for the County (ER 222, ll. 8-14; ER 81, ¶6). Accordingly, Goodheart was provided with general and professional liability coverage at the County's expense, which consisted of a

[1] "ER" refers to the Appellant's Excerpts of Record In Support Of Opening Brief filed below in the Ninth Circuit Court of Appeals, case no. 04-16337.

self-insured retention of $100,000, a $1.1 million layer of excess coverage through CSAC Excess Insurance Authority (a shared risk pool among 46 California counties with premiums based on claims history), and another layer of excess coverage through a commercial policy. Goodheart did not maintain any private coverage for his government work.

B. Nature Of Litigation And Results Below

Respondent, Frank DuMont ("DuMont") received public assistance benefits through the County's general assistance program on an intermittent basis between 1996 and 1998. In 1998, as part of the County's continuing eligibility process, DuMont was required to undergo a psychiatric evaluation to determine whether he had any psychiatric disability that would entitle him to benefits. Goodheart performed the evaluation, and on October 28, 1998, he provided the County with a written report of that evaluation ("the report"). DuMont believed the report contained false statements and unfounded opinions about him.

In April 2000, DuMont filed suit in state court against Goodheart, the County, and others seeking damages for the creation of the report and its subsequent disclosure to DuMont's treating physicians and the Social Security Administration (an agency from which DuMont was also seeking public assistance at the time). DuMont subsequently amended his complaint to include a federal civil rights claim under 42 U.S.C. §1983 for violation of his constitutional right to privacy under the Fourteenth Amendment. Defendants thereafter removed the action to

the U.S. District Court for the Northern District of California ("district court") pursuant to 28 U.S.C. §1441(b).

After a series of motions in district court, all defendants except Goodheart were dismissed from the case on statute of limitations grounds. Goodheart then filed a motion for summary judgment, asserting in relevant part that he was entitled to qualified immunity on plaintiff's federal privacy claim. Goodheart argued that he was entitled to qualified immunity because DuMont had not established a violation of the federal right to privacy, and because the law was not clearly established in 1998 as to what kinds of legitimate government purposes would support a constitutionally permissible disclosure of a public assistance applicant's confidential information to interested third parties. DuMont argued, in response, that Goodheart was not entitled to claim qualified immunity because he was a private party and not a public official.

The district court denied Goodheart's assertion of qualified immunity, finding that all issues concerning DuMont's federal privacy claim were "shrouded in genuine issues of material fact" (App., *infra*, 6a). The district court granted summary judgment in Goodheart's favor, however, with respect to all of DuMont's remaining claims for defamation, intentional infliction of emotional distress, and invasion of privacy under the California constitution (App., *infra*, 6a-9a).

Goodheart appealed the district court's denial of qualified immunity on the federal privacy claim to the Ninth Circuit Court of Appeals under the authority of *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) and 28 U.S.C. §1291. After briefing and oral argument by the parties, the Ninth Circuit affirmed on alternate grounds than those

relied upon by the district court, and did not reach the merits of Goodheart's assertion of qualified immunity. In a brief, unpublished memorandum opinion the Ninth Circuit held, in pertinent part: "This Court's prior precedent, *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2002), in which we held that a government-contracted psychiatrist affiliated with a private firm was not categorically entitled to qualified immunity, controls the outcome of this case" (App., *infra*, 2a). The Ninth Circuit went on to state that Goodheart may be able to assert a good faith defense at trial (App., *infra*, 2a).

The Ninth Circuit did not discuss its reasons for finding *Jensen* controlling. In *Jensen*, the Ninth Circuit held that a psychiatrist who was employed by a large private firm providing medical services to a county hospital was not entitled to claim qualified immunity under *Richardson v. McKnight*, 521 U.S. 399, 413 (1997). The Ninth Circuit reasoned that the private firm that employed the psychiatrist was subject to the exact same "market forces" that barred application of qualified immunity in *Richardson*. *Jensen* at 578-79. By relying on *Jensen* in wholesale fashion to decide the present case, the Ninth Circuit implicitly rejected Goodheart's argument that market forces were not present because Goodheart is an individual, indemnified by the government, and not affiliated with any private firm.

C. The Public Cost Of Litigation

Goodheart's defense costs are over $500,000.00 in this case to date, and this amount does not include trial costs or any damages ultimately awarded. Because of the County's duty to indemnify Goodheart, all of these costs

and damages are being borne by the taxpayers either directly through the County's self-insured retention, or through payment of increasing premiums to the county risk pool and commercial carrier.

This is not an isolated case. According to representatives of CSAC Excess Insurance Authority, 46 of the 58 California counties participate in its risk-pooling program, and all 46 participating counties extend coverage to their contract doctors for liability arising out of their government services in an attempt to attract qualified professionals at reasonable rates. With the widespread use of individual contractors to provide government services efficiently and affordably throughout the country, the extent to which these individuals are entitled to assert the defense of qualified immunity when they are sued for their actions under 42 U.S.C. §1983 is surely a prevalent and substantial issue affecting governmental interests.[2]

REASONS FOR GRANTING THE PETITION

I. The Court Should Settle The Important Question Left Open In *Richardson v. McKnight* Of Whether Qualified Immunity Is Available To Individual Independent Contractors Serving As Adjuncts To Government In Essential Government Activities.

This Court has long held that government officials are entitled to assert the defense of qualified immunity from

[2] *See* Gilman, *Legal Accountability In An Era Of Privatized Welfare*, 89 Ca. L.Rev. 569 (2001) (discussion of history and trends in privatization of governmental welfare functions).

suits alleging violation of civil rights committed under color of law. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The rationale for extending such immunity is to protect the government's ability to perform its traditional functions. *Id.* at 819. Accordingly, the Court has "recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992).

In *Richardson v. McKnight,* 521 U.S. 399, 413 (1997), the Court addressed the extent to which private defendants providing government services were entitled to claim the defense of qualified immunity from suit under 42 U.S.C. §1983. The defendants in *Richardson* were prison guards employed by a large, private, multistate prison management firm that had contracted with state government to operate the state's prison system. To determine whether these prison guards were entitled to claim qualified immunity, the Court first examined the history of immunity for prison guards, and found that the role of a prison guard did not traditionally enjoy immunity from liability. The Court then turned to the "closer question" of whether the policies underlying qualified immunity supported affording it to prison guards employed by a private firm. *Id.* at 407.

The Court's policy analysis focused entirely on the nature of the prison guards' employer: a large, multistate private prison management firm administering entire prison systems for the state. *Id.* at 409. The Court reasoned that this type of large government contractor was subject to competitive market pressures that incentivized it to offer its employees benefits such as private insurance

and higher pay to ensure their effective performance. *Id.* The contractor's ability to use private methods to motivate its employees offset "the most important immunity-producing concern – [the] unwarranted timidity" of the employees in conducting their governmental duties. *Richardson* at 409-10. Similarly, the contractor's ability to offer comprehensive private insurance to its employees met the "immunity-related need to ensure that talented candidates are not deterred by the threat of damages suits from entering public service." *Id.* at 411 (internal citations and quotations omitted). The Court ultimately held that the policies behind allowing qualified immunity were not served by extending it to the employees of a large government contractor.

The Court ended its opinion with an important caveat that limited the case to its facts and left certain questions of immunity unaddressed:

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. *The case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision.*

Id. at 413 (emphasis added). By including this caveat at the end of *Richardson*, the Court strongly implied that the described categories of private defendants performing governmental functions on an individual basis would be

entitled to claim qualified immunity. The Court has not yet defined the scope of these categories, so it remains unsettled what types of actors fall within them.

The courts of appeal have struggled to apply *Richardson* in cases that do not involve defendants who are employees of a large government contractor. The result is a scattered, inconsistent application of *Richardson* among categories of defendants such as employees of small firms providing government services, employees of small non-profit firms providing government services, and individuals hired directly by the government as independent contractors. *Compare Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997) (allowing defense of qualified immunity to attorney in law firm serving as outside counsel to city because "we see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel" under *Richardson*); *with Gonzalez v. Spencer*, 336 F.3d 832, 835 (9th Cir. 2003), *cert. denied*, 540 U.S. 940 (2003) (denying defense of qualified immunity to attorney in law firm serving as outside counsel to county because "no special reasons" existed for extending it to her under *Richardson*). *See also Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000) (allowing qualified immunity defense to employees of small, non-profit firm providing foster care services to county based on lack of profit incentive); *Halvorsen v. Baird*, 146 F.3d 680 (9th Cir. 1998) (denying qualified immunity to employees of small, non-profit firm providing detoxification services for municipality based on firm's need to generate money to survive). Some courts of appeal do not apply *Richardson* at all in cases involving independent contractors, presumably viewing it as inapplicable to private defendants outside the context of a large-scale government contractor. *See Burke v. Town of Walpole*, 405

F.3d 66 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998).

Part of the confusion may stem from *Richardson*'s "obscure" distinction between public and private actors. *Id.* at 422 (Scalia, J., dissenting). As Justice Scalia observed in his dissenting opinion in *Richardson*:

> Is it privity of contract that separates the two categories – so that guards paid directly by the State are "public" prison guards and immune, but those paid by a prison-management company "private" prison guards and not immune? Or is it rather "employee" versus "independent contractor" status – so that even guards whose compensation is paid directly by the State are not immune if they are not also supervised by a state official? Or is it . . . the formal designation of the guards, or perhaps of the guards' employer, as a "state instrumentality" that makes the difference?

Id. Whatever the reason, the approaches of the courts of appeals can differ widely in cases that do not involve defendants employed by a large government contractor. The case at bar offers an ideal vehicle for the Court to further refine its holding in *Richardson*, and resolve the issue of how to treat individuals hired directly by the government, paid directly by the government, and indemnified directly by the government.

An independent contractor like Goodheart is situated differently than an employee of a large, private entity government contractor. The independent contractor's paycheck comes directly from the government; he is not paid through a private firm subject to competitive market pressures. His contract often includes indemnity, as

Goodheart's did, so that his risk of liability for civil rights suits is borne publicly rather than privately. His contract is also likely to include other government-provided benefits such as office space, support services, equipment, access to supplies, mileage, health insurance, and other benefits. Simply put, individual contractors like Goodheart "resemble . . . government employees" much more than they resemble employees of a private firm. *See Richardson* at 410. Because the government is the entity providing the incentives to ensure vigorous and effective performance by the independent contractors, the *Richardson* "marketplace" factors do not seem to apply. This begs the question: Does *Richardson* even provide the appropriate framework for determining whether such individuals are entitled to claim qualified immunity? At least one court of appeal has apparently answered this question in the negative. *See Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005); *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998).

The issue of whether qualified immunity is available to individual government contractors is an important question directly affecting the public's fiscal interests. For example, the availability of qualified immunity bears on the government's ability to offer indemnity as an incentive to attract talented individual contractors to public service. If qualified immunity is not available to individual government contractors, the government faces a dilemma. It can either agree to provide indemnity and bear the resulting litigation costs and damages for the contractor's activities without the protection of qualified immunity, or decline to provide indemnity and face having to pay significantly higher contract rates to offset the contractor's added cost in obtaining his own insurance (at presumably a higher rate than the government is able to obtain).

Either way, the public pays the price, which can be a significant one as demonstrated by the $500,000 in litigation costs the public has incurred thus far in the present case.

Affording qualified immunity to individual government contractors like Goodheart allows the government to offer indemnity to its contractors with the assurance that its liability for civil rights suits will be limited to suits that are the result of objectively unreasonable mistakes. This is an important policy underpinning the extension of qualified immunity to government employees, *see Harlow*, 457 U.S. at 813-14, and it applies with equal force to individual contractors indemnified by the government. In short, because individuals hired on a contract basis directly by the government more closely resemble government employees, qualified immunity should be extended to them for liability arising out of their essential governmental activities.

This Court should accept review in the present case to provide a definitive standard for determining whether individuals hired directly by the government are entitled to claim the defense of qualified immunity in suits alleging a violation of 42 U.S.C. §1983. Allowing such individuals to be swallowed within overly broad interpretations of *Richardson* cannot be tolerated given the important public interests involved.

II. The Ninth Circuit Has Decided An Important Issue Of Government Immunity From Suit Under 42 U.S.C. §1983 In A Manner That Irreconcilably Conflicts With Decisions Of The First Circuit.

Prior to *Richardson*, it was the rule of law in the Ninth Circuit that qualified immunity was not available as a defense to any private actor sued under 42 U.S.C. §1983. *See F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318-19 (9th Cir. 1989). Since *Richardson*, the Ninth Circuit has essentially perpetuated this rule by employing a very broad interpretation of *Richardson*. In each of the seven cases it has decided since *Richardson* involving private defendants claiming entitlement to qualified immunity, the Ninth Circuit has categorically denied the defense each time. *See Halvorsen v. Baird*, 146 F.3d 680 (9th Cir.1998) (denying defense of qualified immunity to employees of private, nonprofit detox firm contracted by city); *Ace Beverage Co. v. Lockheed Information Management Services*, 144 F.3d 1218 (9th Cir. 1998) (denying defense of qualified immunity to employees of private firm processing tickets for city); *Bibeau v. Pacific Northwest Research Foundation Inc.*, 188 F.3d 1105 (9th Cir. 1999) (denying defense of qualified immunity to employees of small private research firm associated with federal government); *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000) (denying defense of qualified immunity to employees of private physicians' group); *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003), *cert. denied*, 540 U.S. 940 (2003) (denying defense of qualified immunity to individual attorney employed by law firm representing county in civil litigation); *DuMont v. Goodheart* 126 Fed.Appx. 427 (April 20, 2005) (present case).

All of the private individuals involved in the aforementioned cases were employees of a firm or entity contractor of some type. In the present case, however, the Ninth Circuit denied the defense of qualified immunity to an individual psychiatrist, hired directly by county government and publicly indemnified from liability for his government activities. The Ninth Circuit did not provide a reasoned decision, but its citation of *Jensen v. Lane County* as controlling precedent provides some insight into its holding. *See Jensen*, 222 F.3d at 576-80.

In *Jensen*, the Ninth Circuit declined to extend qualified immunity to a private psychiatrist who was an employee of a larger physicians' group hired by the county to provide general medical services at a county hospital. *Jensen*, 222 F.3d at 578. The court found that the same exact market forces present in *Richardson* were present in that case based on the psychiatrist's employment by a private entity. *Id.* By citing *Jensen* as controlling below, the Ninth Circuit implicitly found that the same market forces were present to preclude the defense of qualified immunity from being asserted by Goodheart. The Ninth Circuit's decision in this case is not only erroneous (as discussed *infra*), it also cannot be reconciled with the decisions of the First Circuit extending the defense of qualified immunity to individuals hired by the government under very similar circumstances.

In *Camilo-Robles v. Hoyos*, 151 F.3d 1 (1st Cir. 1998), the First Circuit held that two private contract psychiatrists, each hired individually by a municipal police department as independent contractors to perform psychiatric evaluations of police officers, were entitled to assert qualified immunity. The First Circuit held that because the individual psychiatrists were subject to liability under

section 1983 for acting under color of law, they were also entitled to "the balm of qualified immunity." *Id.* at 10. More recently, in *Burke v. Town of Walpole*, 405 F.3d 66 (1st Cir. 2005), the First Circuit reaffirmed this holding by citing it as the basis for extending qualified immunity to a private doctor hired individually by the government to assist with a criminal investigation. *Id.* at 88. Neither of these decisions cited or discussed *Richardson* in any way, and presumably, the First Circuit is of the view that *Richardson*'s holding is inapplicable to persons providing services to the government on an individual basis.

The doctor-defendants in these three conflicting cases are similarly situated in that they are all private individuals hired directly by public entities to provide medical opinions and consulting services for public purposes. In the First Circuit, such doctors are entitled to claim the defense of qualified immunity. In the Ninth Circuit, they are not. The conflict in these decisions is direct and cannot be tolerated. The conflict highlights the Court's need to announce what standard is applicable to individual government contractors for determining their ability to assert qualified immunity.

III. The Ninth Circuit's Decision Below Finding That A Publicly Indemnified Independent Contractor Is Not Entitled To Assert Qualified Immunity Does Not Comport With This Court's Precedent.

By relying on *Jensen* in wholesale fashion to dispose of the qualified immunity issue, the Ninth Circuit implicitly rejected Goodheart's argument that his status as an individual, hired and indemnified directly by the government, distinguished the case meaningfully from cases involving

employees of private entity contractors. The Ninth Circuit did not explain why someone in Goodheart's position is subject to the same competitive market forces as the large prison management firm in *Richardson* or the physician practice group in *Jensen*. The Ninth Circuit's decision also implicitly rejected Goodheart's argument that he was entitled to claim qualified immunity because he was serving as an adjunct to government in an essential government activity. *Richardson* at 413.

Goodheart appears to fall squarely within the language of the Court's caveat in *Richardson* regarding individuals serving as "adjunct[s] to government in essential government activities." *Id.* Goodheart provided disability evaluations and consulting services to a county welfare agency as an independent contractor. Goodheart worked directly with County eligibility workers and staff, and although he exercised his own professional judgment in evaluating applicants, the County focused his attention with respect to discreet issues concerning applicants.

This Court has yet to define what it means to be an "adjunct to government in an essential government activity," and there is only one court of appeals case providing guidance. In *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998), the Second Circuit held that persons working as private fiscal intermediaries for the Medicare program were operating as "adjuncts to government" by investigating and reporting instances of public fraud. *Id.* at 74. Like the fiscal intermediaries in *Pani*, Goodheart was performing an essential public function by making eligibility determinations for public welfare assistance. His position required him to expose any instances of

potential fraud or misuse of the system.[3] The Ninth Circuit failed to address whether Goodheart falls within the important category of government "adjuncts" excepted from the general holding of *Richardson*.

The Ninth Circuit also failed to conduct an appropriate analysis of policy as set forth in *Richardson* in light of the distinguishing characteristics of this case, namely, Goodheart's status as an individual contractor and his entitlement to public indemnity. As discussed *supra*, Goodheart is almost indistinguishable from a government employee in this case. His cost of doing business and overhead are paid by the County. The County provides him with an office, supplies, equipment and support staff at County expense. His overall compensation is far below market value for a private psychiatrist. Because he is publicly indemnified, a damages suit does not increase Goodheart's costs of doing business. The threat of replacement for doing a bad job is also not strong, as Goodheart is performing his duties at a rate that is much lower than what he could obtain in private practice. With the government serving as Goodheart's "employer" for all intents and purposes, it is difficult to understand the basis for the Ninth Circuit's implicit determination that market pressures were present in this case as they were present in *Jensen* and *Richardson*.

Perhaps the most important distinguishing characteristic of this case is the fact that Goodheart is publicly indemnified. As this Court has recognized, litigation costs represent a compelling public concern underpinning the

[3] In fact, this is a component of Goodheart's argument on the merits of the qualified immunity defense in this case.

need for qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). Because Goodheart's risk of liability is borne at the expense of the public, he more closely resembles a government employee than a private employee for immunity purposes. *See Pani* at 74 (finding that publicly-indemnified private contractor administering Medicare claims was entitled to claim qualified immunity because the government "is the real party of interest in any litigation involving the administration of the program.") Allowing an individual like Goodheart to claim qualified immunity serves public rather than private interests, which is the very essence of the doctrine.

The Ninth Circuit's decision below misperceives and misapplies *Richardson*. The Court should accept review of this case to correct a clearly erroneous application of the Court's precedent and to provide guidance for the courts of appeal on this important issue.

IV. Assuming Qualified Immunity Is Available As A Defense To Goodheart, The Courts Below Erred In Concluding That The Law Was Clearly Established With Respect To What Government Interests Would Support A Constitutionally Permissible Disclosure Of A Public Assistance Applicant's Confidential Information.

If the Court grants certiorari in this case, Goodheart intends to argue in his brief on the merits that the courts below erred in concluding that (1) a privacy violation was established by DuMont under *Saucier v. Katz*, 533 U.S. 194 (2001), and (2) that the law was clearly established in 1998 with respect to what types of government interests would support a constitutionally permissible disclosure of a public assistance applicant's confidential information.

See Whalen v. Roe, 429 U.S. 589 (1977); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998). The Ninth Circuit did not reach these issues in light of its determination that Goodheart was not entitled to assert the defense of qualified immunity in the first instance. However, the issues were fully argued and briefed below, and if certiorari is granted, Goodheart intends to address them on their merits because they present important issues of constitutional privacy law.

Briefly, Goodheart's position is that DuMont cannot establish a privacy violation because legitimate government purposes supported disclosure of his confidential information, and because DuMont authorized the disclosure. Moreover, even if the facts taken in the light most favorable to DuMont did show conduct in violation of the federal right to informational privacy, Goodheart is still entitled to qualified immunity because "[his] actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In 1998, the very existence of a constitutional right to informational privacy was a subject of considerable judicial debate. Although most federal circuits in 1998 had recognized that certain disclosures of private medical information were afforded constitutional protection, there were still some circuits that did not yet recognize that the Constitution afforded any protection at all for disclosures of personal information. *See American Federation of Government Employees v. Dept. of Housing and Urban Dev.*, 118 F.3d 786, 791 and 793 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information," but declining to "enter the fray" by determining that

the privacy right did not exist; disposing of case on other grounds). The jurisdictions that did recognize constitutional protection for informational privacy interests in 1998, such as the Ninth Circuit, "struggled to define the limits" of that protection. *See Arakawa v. Sakata*, 133 F.Supp.2d 1223, 1226 (D. Hawaii 2001) (discussing unsettled nature of the law with respect to informational privacy rights and citing cases). *See also Kallstrom v. Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998) ("the boundaries of the right to privacy have not been clearly delineated"); *Davis v. Bucher*, 853 F.2d 718 (9th Cir. 1988) (recognizing that "the extent to which the [Constitution] substantively protects the individual against disclosure of personal information is a substantial question"); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) ("the exact boundaries of this right are, to say the least, unclear").

In 1998, the Ninth Circuit had discussed the right to informational privacy in medical information in just three cases. *See Doe v. Attorney General of the U.S.*, 941 F.2d 780 (9th Cir. 1991); *Roe v. Sherry*, 91 F.3d 1270 (9th Cir. 1996); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998). The Ninth Circuit recognized in those cases that the federal right to privacy encompassed medical information. However, the Ninth Circuit also recognized that the federal right to privacy in medical information was not absolute, and that it could be infringed for proper governmental purposes. *See Doe* at 796; *Roe* at 1274; *Norman-Bloodsaw* at 1269. It is this aspect of the law on informational privacy, i.e. what governmental purpose(s) would justify such an infringement, which was far from clear in 1998. The existing case law simply had not developed to the point where a government official in Goodheart's position would reasonably know what

government disclosures would or would not violate the still-burgeoning federal right to informational privacy.

Given the unsettled status of the law on the scope of the constitutional right to informational privacy in 1998, it is difficult to conceive how Goodheart, or any reasonable official in his position, could have understood that DuMont's right to privacy in his confidential medical information outweighed the governmental purposes supporting the disclosure. There was simply nothing in the law as it existed in 1998 that would have put Goodheart on notice that recommending or requesting the disclosure of his report to DuMont's treating physicians and the Social Security Administration, under the circumstances of the case, would infringe upon DuMont's constitutional right to privacy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK W. DUMONT, JR., Plaintiff-Appellee, v. WILLIAM B. GOODHEART, in his individual capacity and in his official capacity with the County of Marin, Defendant-Appellant.	No. 04-16337 D.C. No. CV-01-04921-MJJ MEMORANDUM* (Filed Apr. 20, 2005)

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted March 15, 2005
San Francisco, California

Before: THOMAS, FISHER, Circuit Judges, and ROBART, District Judge.**

Appellant William B. Goodheart, M.D. ("Dr. Goodheart") appeals the district court's order denying summary judgment of Appellee Frank DuMont's ("DuMont") claim for relief under 42 U.S.C. § 1983 on the basis of qualified immunity. Because the parties are familiar with the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

factual and procedural history of the case, we will not recount it here.

We have jurisdiction under 28 U.S.C. § 1291, and we affirm. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). This court's prior precedent, *Jensen v. Lane County,* 222 F.3d 570 (9th Cir. 2000), in which we held that a government-contracted psychiatrist affiliated with a private firm was not categorically entitled to qualified immunity, controls the outcome of this case. Although qualified immunity is not categorically available to Dr. Goodheart, he "may be able to assert an affirmative good faith defense" to liability under § 1983. *Id.* at 580, n.5 (citing *Richardson v. McKnight,* 521 U.S. 399, 413 (1997); *Wyatt v. Cole,* 504 U.S. 158, 169 (1992)).

We deny DuMont's motion for double attorneys' fees and costs related to this appeal and deny Dr. Goodheart's motion for sanctions and motion to strike DuMont's brief. We grant the parties' cross-motions to seal certain excerpts of record.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK W. DUMONT, JR.	No. C 01-4921 MJJ
Plaintiff,	**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
v.	
WILLIAM B. GOODHEART, MD,	
Defendant. /	(Filed Jun. 16, 2004)

Before the Court is a personal tort case brought by Frank W. DuMont Jr. (DuMont) against William B. Goodheart (Goodheart) under 42 U.S.C. § 1983 and state law. Goodheart moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. The Court heard oral argument on March 23, 2004. Based on that argument, the parties' submissions, and the record before the Court, Goodheart's motion is GRANTED IN PART AND DENIED IN PART.

I. BACKGROUND

DuMont is the former patient of Goodheart, a psychiatrist who evaluates persons applying for Marin County, California (Marin) general assistance benefits. Although the record is unclear as to the sequence of events culminating in Marin's denial of benefits to DuMont (and those facts are immaterial to this motion), the parties agree that, on October 28, 1998, Goodheart rendered an extensive evaluation of DuMont. In his October 28 evaluation, Goodheart recommended that Marin deny DuMont benefits because he was employable. Two Marin employees also sent this evaluation to various physicians (either

treating DuMont or evaluating his eligibility for governmental benefits) and to the Social Security Administration. In April 2000, DuMont sued Goodheart and others in state court, which the defendants removed to this Court. After numerous amendments to the pleadings and a series of decisions by this Court, DuMont's remaining claims are for defamation, invasion of privacy (both under the California and United States Constitutions), and intentional infliction of emotional distress. Now, Goodheart, the only remaining defendant, moves for summary judgment and DuMont opposes.

II. LEGAL STANDARD

The Court must render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it is relevant (according to the underlying substantive law) to an element of a claim or defense and its existence might affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears the initial burden of establishing that there is no genuine issue of material fact. *Celatex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has properly supported its summary judgment motion, the burden shifts to the nonmoving party. At that time, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but instead "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "must do more than simply show that there is

some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1987). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). In sum, the Court's ultimate inquiry is whether the specific facts set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. *T.W. Elec. Serv.*, 809 F.2d at 631.

The Court does not make findings of fact at summary judgment. *Anderson*, 477 U.S. at 250. "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* The Court, consequently, draws all inferences in the light most favorable to the nonmoving party and presumes that the nonmoving party's evidence is true. *Eisenberg v. Insurance Co. of N. Am.*, 815 F.2d 1285, 1289 (9th Cir. 1987).

III. ANALYSIS

A. Federal Claim

Goodheart is not entitled to summary judgment on DuMont's federal invasion of privacy claim. The constitutional right of privacy, whether founded in the Fourteenth Amendment's concept of personal liberty or the Ninth

Amendment's reservation of rights to the people, protects "the individual interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), which "clearly encompasses medical information and its confidentiality." *Norman Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998). Goodheart argues, as he did during his motion to dismiss previously denied by this Court, that he is entitled to summary judgment because Marin (not he) disclosed DuMont's information, because DuMont authorized the release of information, because the invasion was not serious, because Goodheart was not acting under the color of law, because the invasion had a legitimate public purpose, and because Goodheart had qualified immunity. Each of these arguments, as this Court found earlier, is shrouded in genuine issues of material fact. And, Goodheart fails to present any evidence or authority undermining the Court's previous decision. Goodheart's motion for summary judgment on DuMont's federal invasion of privacy claim, therefore, is DENIED.

B. State Claims

The California common interest privilege protects Goodheart from liability for the non-malicious dissemination of the October 28 evaluation, entitling him to summary judgment on DuMont's state law claims. The privilege, specifically, protects communications made "without malice, to a person interested therein, [] by one who is also interested. . . ." Cal. Civ. Code §47(c); *see also Coastal Abstract Serve Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 735 n.8 (9th Cir. 1999) ("Although privilege commonly arises in cases involving defamation, California has also applied its statutory privileges to other torts," including intentional infliction of emotional distress and

invasion of privacy). An "interest" is a "direct and immediate concern . . . other than mere general or idle curiosity . . . ," such as a pecuniary or proprietary interest. *Rancho La Costa, Inc. v. Superior Court*, 165 Cal. Rptr. 347, 359 (Cal. Ct. App. 1980). Goodheart bears the burden of showing that he and the recipients were commonly interested; thereafter, the burden shifts, requiring DuMont to show malice. *See Lundquist v. Reusser*, 875 P.2d 1279, 1284 (Cal. 1994). As shown by DuMont's complaint, Goodheart's deposition testimony (he recommended that Marin disseminate the October 28 evaluation because it "contained critical valuable information for any treating or evaluating doctor. . . . Particularly there's concerns, they were talking about possible surgery"), and this Court's earlier holding, the communication-at-issue was between interested persons. Goodheart's relationship to the recipients (others treating, evaluating, or providing benefits to DuMont) is based, at least in part, on the pecuniary and proprietary interests arising from their obligations to help their patients and beneficiaries. Goodheart and the recipients, thus, have a common interest regarding the medical concerns of patients, including DuMont.

No reasonable juror could find that Goodheart acted with malice. "The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights." *Sanborn v. Chronicle Pub. Co.*, 556 P.2d 764, 768 (Cal. 1976) (quoting *Roemer v. Retail Credit Co.*, 119 Cal. Rptr. 82, 88 (Cal. Ct. App. 1975)); *see* Cal. Civ. Code § 48a(4)(d). The Court may not infer malice from the

communication-at-issue, Cal. Civ. Code § 48, and "[t]here is a rebuttable presumption that the communication is made innocently and without malice." *Moore v. Greene*, 431 F.2d 584, 592 (9th Cir. 1970). DuMont's only proffer of extrinsic evidence of malice is based on his allegation that Goodheart "interjected" himself into Marin's examination of DuMont as "a subterfuge to review 'decades' of drug use to support his 'suspicion' that drug abuse was central. . . . " At the hearing, DuMont attempted to explain this argument, citing his declaration's attachments: an "official memo" from a Marin employee requesting that Goodheart speak with the doctor reviewing DuMont (Exhibit 15) and Marin's "Standards and Policies of General Relief" (Exhibit 40), which, according to DuMont, demonstrate that Goodheart exceeded Marin's request for his services; and, Goodheart's two prior reports (Exhibits 17 and 18) that found DuMont eligible for some assistance even though he was "pumping up" his injuries, a conclusion DuMont argues Goodheart changed after "interjecting" himself into DuMont's proceedings, as shown by notes from DuMont's appeal (Exhibit 26), all for the purpose of attacking DuMont's character. The Court however, cannot consider these Exhibits because DuMont's declaration does not satisfy Federal Rules of Evidence 901 or 902. *Orr v. Bank of Am., NT & SA*, 285 F3d 764, 773 (9th Cir. 2002). Nevertheless, in the light most favorable to DuMont, the record before the Court is insufficient for a jury to conclude that Goodheart acted with hatred, ill will, or reckless disregard.

The Court finally, rejects DuMont's arguments that its earlier rulings and the Confidentiality of Medical Information Act, Cal. Civ. Code §§ 56-56.37 (CMIA), preclude

summary judgment. As for the former, the Court previously found that DuMont properly pled around the privilege. At summary judgment, however, mere allegations in pleadings are insufficient. Fed. R. Civ. P. 56(e). DuMont must (but failed to) provide the court with evidence showing a genuine issue of material fact. DuMont's CMIA argument also fails. Although the CMIA may trump the common interest privilege in a conflict, *Pettus v. Cole,* 57 Cal. Rptr. 2d 46, 70 (Cal. Ct. App. 1996), the two statutes are consistent here because the CMIA provides an Applicable exception. Cal. Civ. Code § 56.10(c)(1) ("The information may be disclosed to providers of health care, health care service plans, contractors, or other health care professionals or facilities for purposes of diagnosis or treatment of the patient."). Goodheart's motion for summary judgment on DuMont's state claims, therefore, is GRANTED.

IV. CONCLUSION

For the reasons set forth above, Goodheart's motion for summary judgment is GRANTED IN PART AND DENIED IN PART and DuMont's state law claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED..

Dated: 6/16/2004

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK W. DUMONT, JR.

Plaintiff,

v.

WILLIAM B. GOODHEART, M.D.,

Defendants.

/

No. C 01-4921 MJJ

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S "SIXTH AMENDED COMPLAINT"; DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SEVENTH AMENDED COMPLAINT

(Filed Sep. 10, 2003)

INTRODUCTION

On August 16, 2002, the Court issued an order granting in part and denying in part Defendants' motion to dismiss Plaintiff's Fifth Amended Complaint (August Order"). Specifically, the Court:

(1) Granted, without prejudice, Defendant Goodheart's motion to dismiss with respect to Plaintiff's claim of negligent infliction of emotional distress;

(2) Denied Defendant Goodheart's motion to dismiss with respect to Plaintiff's claims of defamation, invasion of privacy, intentional infliction of emotional distress, and violation of 42 U.S.C. § 1983;

(3) Granted, without prejudice, Defendants County of Marin, Veronica Morgan, Miriam Rimkeit, Heidi Allgaier, and Mary Donovan's (collectively "County Defendants") motion to dismiss Plaintiff's § 1983 claim.

See generally August Order. Plaintiff was given twenty (20) days to filed [sic] an amended complaint. *See id.* at 17.11.

Then, on April 16, 2003, the Court issued an order noting that Plaintiff had yet to file an amended complaint and scheduling a status conference for May 20 to discuss the case going forward. At the conference, Plaintiff was given an additional ten (10) days to file an amended complaint consistent with the August Order. On May 30, 2003, Plaintiff filed an unsigned and incomplete "Sixth Amended Complaint."

On June 10, 2003 Plaintiff filed a motion for leave to file a Seventh Amended Complaint. On June 24, Defendant Goodheart filed a motion to dismiss or, in the alternative, strike Plaintiff's Sixth Amended Complaint, which was joined by the County Defendants. The Court now considers both motions.

ANALYSIS

A. Defendants' Motion to Dismiss Plaintiff's "Sixth Amended Complaint"

There is no question that Plaintiff "Sixth Amended Complaint" must be stricken pursuant to Federal Rule of Civil Procedure 11, which provides that "[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party." In this case, Plaintiff's counsel has yet to submit a signed copy of the "Sixth Amended Complaint," despite being aware of situation for several months. Of course, such an act would be of limited value because the "Sixth Amended Complaint" is not only unsigned, but incomplete. Specifically, the complaint only

includes Plaintiff's defamation claim and a portion of his claim for invasion of privacy). In other words, even if what Plaintiff submitted on May 30 had been signed, he would be better off allowing the Fifth Amended Complaint to go forward as the operative pleading because it contains a greater number of viable claims. Moreover, the "Sixth Amended Complaint," even if signed, also fails to comply with Rule 8(a)(3) in that there is no demand for relief. Therefore, the Court grants Defendants' motion to strike Plaintiff's "Sixth Amended Complaint."

B. Plaintiff's Motion for Leave to File a Seventh Amended Complaint

Based on Plaintiff's failure [sic] amend in a timely fashion, despite being given two opportunities to do so, as well as the number of previous amendments, the Court denies Plaintiff's motion to file a Seventh Amended Complaint. *Forman v. Davis*, 371 U.S. 178, 182 (1962) ("repeated failure to cure deficiencies by amendments previously allowed" is a basis for denying leave to amend).[1]

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[1] The Court also notes that Plaintiff's proposed Seventh Amended Complaint contains several causes of action that were not present in the Fifth or "Sixth" Amended Complaints, including several claims that were previously dismissed with prejudice. For example, Plaintiff seeks to add claims for negligence and breach of a confidential relationship against Defendant Goodheart. However, the Court dismissed these claims with prejudice on March 22, 2002. *See* Order Striking Fourth Amended Complaint; Denying Plaintiff's Motion to Remand; Granting Defendants' Motions to Dismiss. Therefore, not only are these claims futile, the fact that Plaintiff is attempting to reassert them is indicative of bad faith. Moreover, considering the fact that the above entitled action was originally filed almost two years ago, there are issues of delay with respect to all of the "newly asserted" claims. *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999) (the propriety

(Continued on following page)

CONCLUSION

Based on the foregoing analysis, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's "Sixth Amended Complaint" and **DENIES** Plaintiff's motion for leave to file a Seventh Amended Complaint. The Court also finds that the only viable claims remaining in this action are the claims against Defendant Goodheart for defamation, invasion of privacy, intentional infliction of emotional distress, and violation of § 1983. Therefore, Defendant Goodheart is ordered to file an answer to these claims, as asserted in the Fifth Amended Complaint, within twenty (20) days of this order, and the County Defendants are dismissed from the action entirely.

IT IS SO ORDERED.

Dated: September 9, 2003 /s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE

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of a motion to amend is determined "by ascertaining the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility").

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK W. DUMONT JR.,

Plaintiff,

v.

WILLIAM B. GOOD-HEART, M.D., et al.,

Defendants

/

No. C 01-4921 MJJ

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS; DENYING DEFENDANT GOODHEART'S MOTION FOR A MORE DEFINITE STATEMENT

(Filed Aug. 23, 2002)

INTRODUCTION

Before this Court are two motions: a motion to dismiss pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(6), or alternatively a motion for a more definite statement pursuant to FRCP 12(e), filed by Defendant William B. Goodheart ("Goodheart"); and a motion to dismiss pursuant to FRCP 12(b)(6) filed by Defendants County of Marin, Veronica Morgan, Miriam Rimkeit, Heidi Allgaier and Mary Donovan (collectively "County Defendants"). Having considered the papers submitted,[1] and having heard the parties, the Court

[1] Together with his opposition to the motions, Dumont requests judicial notice of documents filed in the action before it was removed to this Court. The documents are public records in related or underlying cases which have a direct relation to the matters at issue and appropriate for judicial notice, and appropriate for judicial notice. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (finding that the Court may take judicial notice of public records outside the pleadings); *see also In re American Continental Corp./Lincoln Savings and Loan Sec. Lit.*, 102 F.3d 1524, 1537 (9th Cir. 1996), *rev'd on other*

(Continued on following page)

GRANTS IN PART and DENIES IN PART the motions to dismiss ("DMD") and DENIES Goodheart's motion for a more definite statement.[2]

FACTUAL BACKGROUND

In April 2000, Frank W. Dumont ("Dumont" or "Plaintiff") initiated suit in the Superior Court for the County of Marin against Goodheart alleging various causes of action. *See Frank W. Dumont v. William B. Goodheart, M.D.*, No. 00-2007 Superior Court for the County of Marin, Complaint. Dumont amended his complaint three times while in state court. *See id.*, First Amended Complaint, Second Amended Complaint ("SAC"), and third Amended Complaint ("TAC"). With the TAC, Dumont named County Defendants to the suit for the first time and County Defendants removed the case to this Court.

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grounds by Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 520 U.S. 26 (1998) (finding that courts may take judicial notice of "matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue" without converting the motion into one for summary judgment). Therefore, the request for judicial notice is GRANTED.

[2] Dumont objects to and moves to strike "Exhibit B," which Goodheart filed with the Court under seal as part of his motion to dismiss. Dumont moved to strike on the grounds that (1) the exhibit is not accompanied by any declaration describing what it is, or stating whether it is a true and correct copy of what it purports to be; and (2) the exhibit was not served on Dumont's counsel. Goodheart subsequently filed a supplemental declaration of Goodheart's counsel to request to file Exhibit B under seal. This document describes Exhibit B as being the Goodheart's evaluation report issued on October 28, 1999, (referred to by Plaintiff as the "Offending Report") and states that it is a complete and accurate copy. Goodheart served on Dumont's counsel this supplemental declaration with the attached Exhibit B, and Dumont withdrew his objections thereto.

The TAC set forth the following six causes of action against Goodheart as an individual: (1) defamation – libel; (2) right of privacy based on state and federal statutory and constitutional rights; (3) intentional and negligent infliction of emotional distress; (4) breach of confidential relationship; (5) breach of physician/patient privilege; and (6) negligence. Dumont further made a claim for violation of 42 U.S.C. § 1983 ("Section 1983") against County Defendants and Goodheart (collectively "Defendants"); in their official capacities.

In response to the TAC, Defendants filed their respective motions to dismiss. Dumont thereafter filed a Fourth Amendment Complaint, along with a motion for remand. This Court denied Plaintiff's motion for remand and issued an order striking the Fourth Amended Complaint as improperly filed. *See* March 22, 2002 Order ("March Order") at 4-8. It further granted, with leave to amend, Goodheart's dismissal motion with respect to the claims for defamation, violation of a right to privacy, intentional and negligent infliction of emotional distress, and violation of Section 1983. *See id.* at 8-15. The Court also dismissed, without prejudice, the Section 1983 claim against County Defendants. *See id.* Goodheart's motion was granted, without leave to amend, as it pertained to those claims premised on a physician/patient relationship, namely Dumont's claims for breach of confidential relationship, breach of physician/patient privilege, and negligence. *See id.*

Currently before the court is Dumont's Fifth Amended Complaint ("FAC"), which sets forth three causes of action against Goodheart as an individual and in his official capacity as follows: (1) First Cause of Action: Defamation – Libel; (2) Second Cause of Action: Right of Privacy based

on State and Federal Statutory and Constitutional Rights; (3) Third Cause of Action: Intentional and Negligent Infliction of Emotional Distress. In the FAC is also a Fourth Cause of Action against Defendants, each in their official capacity, for violations of Section 1983.

The FAC, like the complaints before it, is premised on conduct which occurred after he applied for general assistance ("GA") with Defendant Department of Health and Human Services of the County of Marin ("Department'). Specifically, Dumont contends he underwent a psychiatric evaluation as part of the application process. Goodheart, a psychiatrist under contract with the Department, performed the evaluation and prepared the Offending Report which, according to Dumont, contained 'a multitude of damaging and libelous statements. . . . " FAC at ¶ 27.[3] Dumont asserts Goodheart disseminated the Offending Report to third parties, including County Defendants. County Defendants thereafter allegedly disseminated the Offending Report to other entities, such as the Social Security Administration ("SSA") and Veterans Administration ("VA"), from which Dumont sought further assistance. *See id.* at ¶¶ 41-50. As a result of the dissemination, Dumont claims to have suffered injuries such as humiliation and

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[3] Specifically, Dumont claims the Offending Report "consistently conclud[ed] that [Dumont] was not entitled to [g]eneral [a]ssistance *on any ground* and that [Dumont's] complaints [sic] of severe, disabling pain emanating from several points in his body were not *credible* despite the objective evidence . . . " otherwise. FAC at ¶ 27. Dumont asserts the Offending Report contained the following examples of libelous state-ments: (1) Dumont "has had a 'probable narcotic dependence since the age of 18' "; (2) Dumont has used "illegal and illicit substances impliedly obtained from sources other than the medical doctors"; and (3) Dumont "is a 'homosexual.' " *Id.* at ¶ 40.

the denial of benefits to which he was otherwise entitled. *See id.* at ¶ 51.

Goodheart and County Defendants each now bring separate motions to dismiss. In the alternative, Goodheart moves for a more definite statement together with his dismissal motion.

LEGAL STANDARD

I. Failure to State a Claim

Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478 (9th Cir. 1991). Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacific Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The Court will dismiss the complaint or any claim in it without leave to amend only if "it is absolutely clear that the deficiencies of the complaint would not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

II. Motion for a More Definite Statement

"If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e). A Rule 12(d) motion is proper only if the complaint is so indefinite that the defendant cannot ascertain the nature

of the claim being asserted. *See Farnolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F. Supp. 940, 949 (E.D. Cal. 1981). Thus, a motion for a more definite statement should not be granted unless the defendant literally cannot frame a responsive pleading. *See Bureerong v. Uvawas*, 922 F. Supp. 1450, 1461 (C.D. Cal. 1996).

ANALYSIS

I. Goodheart's Motion to Dismiss

A. California Tort Claims Act

Goodheart moves to dismiss Dumont's first, second and third causes of action with respect to Goodheart in his official capacity, contending Dumont failed to comply with requirements of the California Tort Claims Act ("CTCA") in pleading his state law claims. *See* Cal. Gov't Code §§ 905, 905.2, 910, 945.4.[4] As a general statutory requirement, a state law action for money or damages may not be maintained against a public entity or its employee unless a written claim has first been timely presented to the defendant and rejected in whole or in part. *See* Cal. Gov't Code § 945.4; *Karim-Panabi v. Los Angeles Police Dept.*, 839 F.2d 621, 627 (9th Cir. 1988). Joined causes of action in federal court based on state law tort claims are subject to dismissal unless the claims filing requirements have been complied with concerning those causes of action. *See id.* The purpose of the claim statute is not to prevent

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[4] This Court previously granted with leave to amend Goodheart's motion to dismiss on these grounds because Dumont had not sufficiently alleged compliance with the CTCA requirement and it was unclear whether Dumont was able to allege compliance. *See* March Order at 13.

surprise, but "to provide the public entity with sufficient information to enable it to adequately investigate claims and to settle them." *City of San Jose v. Superior Court of Santa Clara County*, 12 Cal. 3d 447, 455 (1974).

Under California's "substantial compliance doctrine," cases gauging sufficiency of claims are divided into two groups. *San Jose*, 12 Cal. 3d at 456. First, where there has been *some* compliance with all the required elements, but compliance has been defective, courts ask whether there is sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to investigate and settle the claim. *Id.* Second, where claims have failed to comply *entirely* with a particular statutory requirement, courts have held that "substantial compliance cannot be predicated upon no compliance." *Id.*

California Government Code section 910 (a-d) sets forth the following requirements for a claim: (1) name and address of the claimant; (2) address to which the claimant desires notices to be sent; (3) date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; and (4) general description of the indebtedness, obligation, injury, damages or loss incurred so far as it may be known at the time of presentation of the claim. *See* Cal. Gov't Code § 910. On November 10, 2000, Dumont mailed a letter and the SAC to Mary Donovan, one of the individually named County Defendants. *See* FAC at ¶ 77 and exhibits 2, 3. Dumont claims these mailings "substantially satisf[y] the requirements of the claim prerequisite under the [CTCA]." FAC at ¶¶ 38, 82.

The Court agrees with Dumont. The November 10 letter meets the first two claim requirements by providing Dumont's name and the address of his attorney. *See*

Cameron v. City of Gilroy, 104 Cal. App. 2d 76, 79 (App. 1 Dist. 1951) (holding that the office address of the attorney of one who files a claim against a city constitutes sufficient compliance with the claim requirement). The SAC sent to Donovan, under separate cover but on the same day, provide with sufficient detail the date, place and other circumstances of the occurrence, as well as the injury or loss incurred, as to provide the County with sufficient information to enable it to adequately investigate and settle the claims.[5] Indeed, Dumont's letter, which expressly stated that he was suing Goodheart, albeit in his individual capacity, and that the County "may yet become a party to this lawsuit for its contribution to the violation of Mr. Dumont's rights," FAC exhibit 2, provided the Department with sufficient information to investigate the claim, especially in light of the letter's assertion that the Department made "contributions" to the violation.

The Court finds the conduct, as described, constitutes substantial compliance with the formal CTCA claim requirements.[6] The Court, therefore, DENIES

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[5] Dumont points out that Goodheart's motion focuses on the letter sent November 10 and "essentially ignor[es] the facts and history of the claim sent by way of a copy of the [SAC]." Opposition to DMD at 2. Although Goodheart's reliance on the SAC for compliance with the claim requirement is not ideal, the court agrees with Plaintiff that his inclusion of the SAC cannot be ignored. This is especially true since the Department does not dispute it received the SAC.

[6] In his Reply in Support of DMD, Goodheart relies on *Del Real v. City of Riverside* to support his contention that the letter of November 10 neither met the claim requirements nor reflected Dumont's present intention to make a claim for damages against the County. 95 Cal. App. 4th 761 (App. 4 Dist. 2002). However, this case is distinguishable in three significant ways. First, the *Del Real* court held that the claim

(Continued on following page)

Goodheart's motion on these grounds.[7]

B. Defamation

Goodheart moves to dismiss the first cause of action for defamation on the grounds that his statements are not capable of a defamatory meaning and that his communication was privileged under the common interest privilege codified at California Civil Code section 47(c) ("Section 47").[8] The Court addresses each of these arguments in turn below.

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requirements failed most importantly because "it was not directed to the public entity but to [the officer] personally." Dumont, on the other hand, sent the letter to Donovan. Second, unlike the plaintiff in *Del Real*, Dumont additionally sent a copy of the SAC on the same day as the letter, which contained much of the information Goodheart argues is missing. Finally, because the letter in *Del Real* only sought information from the officer, it could not reasonably be interpreted to contemplate litigation. Dumont's letter on the other hand, expressly stated he was suing Goodheart based on his conduct on behalf of the Department and that the County "may yet" become a party to the lawsuit. FAC exhibit 2.

[7] Without deciding the same, Defendants may have waived their right to the defense as to the insufficiency of the claim by failing to notify Dumont of defects. CTCA section 911 provides that "any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to such defect or omission." Cal. Gov't Code § 911; *see also Phillips v. Desert Hospital District*, 49 Cal.3d 699, 701-2 (1989) (holding that a public entity must treat a notice . . . that alerts it to the existence of a claim for monetary damages and an impending lawsuit but fails to comply substantially with the claim presentation requirements of the act, as a defective 'claim' that triggers the operation of statutes requiring it to notify the claimant of insufficiencies of content or timeliness, or else it waives any defenses based on those insufficiencies).

[8] Dumont's Opposition fails to address Goodheart's arguments regarding the first, second, third and fourth causes of action, "opting instead to challenge the procedural appropriateness of raising them by

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1. Not Capable of a Defamatory Meaning

Goodheart's argument that his statements are not capable of a defamatory meaning turns on the question of whether the statements were statements of fact or opinion. the plaintiff must plead the existence of false statements of fact. *Jensen v. Hewlett-Packard Co.*, 14 Cal. App. 4th 958, 970 (App. 4 Dist. 1993). Whether a statement is capable of a defamatory meaning should be determined in the context of the publication as a whole. *Id.*

Goodheart analogizes the allegations against him to those made against the defendants in *Jensen*, where the plaintiff sued based on an unfavorable performance evaluation. The *Jensen* court held that the statement based on an unfavorable performance evaluation was not capable of defamatory meaning because it was a statement of opinion, not fact. *See Jensen*, 14 Cal. App. 4th at 970. While Dumont's complaint points to some element of "opinion," it also pleads the existence of false statements of facts sufficient to defeat a motion to dismiss. Indeed, the FAC alleges Goodheart "includes in the [O]ffending [R]eport

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way of a 12(b)(6) motion to dismiss." Goodheart's Reply in Support of DMD at 4. Dumont contends that Goodheart's arguments in DMD pertain to issues that should have been raised in earlier 12(b)(6) motions. Opposition to DMD at 7. The case law does not support this argument. "Because a plaintiff's new complaint wipes away prior pleadings, the amended complaint opens the door for defendants to raise new and previously unmentioned affirmative defenses." *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999). Dumont improperly relies on *Turbe v. Government of Virgin Islands* for the proposition that a 12(b)(6) motion to dismiss must be made before a responsive pleading is filed, otherwise it is deemed to be a Rule 12(c) motion for judgement on the pleadings, 938 F.2d 427, 428 (3d Cir. 1991). Goodheart correctly points out that this general proposition does not apply where a complaint has been amended. Goodheart's Reply in Support of DMD at 4.

so-called 'summaries' of 'medical records' and other material which summaries are replete with factual errors and peppered throughout with Defendant Goodheart's own conclusions and judgements." FAC at ¶ 39. Dumont specifically alleges Goodheart's statements about Dumont's "abuse" of illegal substances and sexual orientation were false statements of fact. *Id.* at ¶ 40. Although Goodheart disputes these allegations, *see* DMD at 7, it is enough Dumont alleged the existence of false statements of facts for this Court to find that the statements are statements of fact, as opposed to opinion, and capable of a defamatory meaning.

2. Common Interest Privilege

Goodheart argues his statements are privileged under the common interest privilege as set forth under Section 47. Under this section, a publication is privileged when it is made "in a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent. . . ." Cal. Civ. Code § 47(c). "Where a complaint discloses a case of qualified privilege, no malice is presumed and in order to state a cause of action the pleadings must contain affirmative allegations of malice in fact." *Locke v. Mitchell*, 7 Cal. 2d 599, 603 (1936).

The FAC discloses a case of qualified privilege under Section 47 because it acknowledges Goodheart perceived a common interest among himself and the recipients of the Offending Report. Specifically, Dumont alleges that "[Goodheart] deemed the recipient might have an interest in the report because Defendant Goodheart knew that the

recipients were processing claims for, and/or providing evidentiary support for plaintiff's attempt to obtain, assistance for his basic sustenance and his disabilities." FAC at ¶ 55.

Because the FAC disclosed a case of qualified immunity, no malice is presumed unless the FAC pleads affirmative allegations of malice in fact. Here, Dumont states Goodheart made the statements and thereafter published them maliciously. FAC at ¶¶ 40(d), 42, 46. He further points to the lack of any official duty owed by Goodheart to the recipients. *Id.* at ¶ 46. In doing so, Dumont alleged malice in fact sufficient to defeat Goodheart's motion to dismiss on these grounds. *See Locke*, 7 Cal.2d at 603 (holding "when the complaint discloses that the occasion was privileged, the allegation that the language was false and malicious is not sufficient . . . [T]he complaint must further show that the defendant acted maliciously in publishing it by alleging in express terms that defendant acted maliciously or averring facts which would have been the equivalent of such allegations."). The Court therefore DENIES Goodheart's motion to dismiss the defamation cause of action.

C. State Constitutional Right of Privacy

Goodheart moves to dismiss Dumont's second cause of action, arguing that Dumont has not alleged the essential elements for a cause of action for invasion of the state constitutional right of privacy.[9] *See* Cal. Const., art. I, § 1.

[9] Goodheart's motion only challenges the state constitutional right to privacy; it does not address the other state statutory and federal

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The three elements necessary for this cause of action are: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of the privacy interest. *Hill v. Nat'l Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994). "If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." *Id.* at 40. Goodheart argues Dumont's action for invasion of privacy must fail because Dumont had a diminished expectation for privacy under the circumstances in this case, and the alleged invasion of privacy was not serious.

1. Reasonable Expectation of Privacy

Dumont alleges in the FAC "plaintiff had a reasonable expectation that his privacy in the rest of the information[10] would be honored insofar as the confines of the GA was concerned." FAC at ¶ 92. Goodheart makes much of Dumont's acknowledgment in the FAC that he signed "releases"; however, the FAC alleges Dumont was advised that his information was confidential and that these releases were intended to enable the GA to gather information, not disseminate the GA's evaluation and/or summery thereof. *Id.* Given the narrow scope of the "release", Dumont's expectation his personal information would not be disseminated to unrelated agencies was

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constitutional sources of Dumont's right to privacy alleged in the complaint. FAC at ¶ 55.

[10] "Rest of the information" refers to the information in the Offending Report Dumont did not directly provide to treating physicians, the Veterans Administration, and the Social Security Administration.

reasonable as alleged. Because some reasonable expectation of privacy is evident in the FAC, dismissal on these grounds is inappropriate.

2. Seriousness of the Invasion

An actionable invasion of privacy under the California Constitution is one sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. *Hill*, 7 Cal. 4th at 26. In California, courts have held that protection from detailed disclosure of medical history and psychological profiles are within the state constitutional right of privacy. *See, e.g., Pettus v. Cole*, 49 Cal. App. 4th 402, 440-47 (App. 1 dist. 1996) (holding that an employee was protected from detailed disclosures to employer of sensitive and personal medical history and psychological profile when obtained as part of employer's requested evaluation for purposes of establishing employee's disability); *see also* Confidentiality of Med. Info. Act, Cal. Civ. Code, § 56.

Dumont alleges Goodheart disseminated sensitive and personal medical history and psychological profile which was obtained in connection with Dumont's application for GA. As a consequence of the invasion he was denied the government assistance he needed and to which he believed he was entitled. He was also deprived of the care, assistance and treatment of treating physicians who were also recipients of the Offending Report. Disclosure, as alleged by Plaintiff, was sufficiently serious. Moreover, these [sic] alleged impact was serious as it speaks to Dumont's livelihood and ability to receive proper medical care. The

Court, therefore, DENIES Goodheart's motion to dismiss Dumont's state privacy right of action.

D. Negligent and Intentional Infliction of Emotional Distress

1. Negligent Infliction of Emotional Distress

Goodheart moves to dismiss the third cause of action for negligent infliction of emotional distress ("NIED"), arguing Dumont fails to clearly allege a specific basis for a negligence duty by premising the claim on the existence of a doctor/patient relationship. DMD at 13. Goodheart points out this Court previously dismissed all causes of action premised on the doctor/patient relationship. *Id.* (citing March Order at 13-14).

Although the duty underlying the NIED claim can not [sic] stem from a doctor/patient relationship, there may be other sources on which Plaintiff may base his NIED claim. Indeed, at oral argument Dumont argued that the various federal and state statutes protecting privacy rights create a statutory duty not to invade the privacy of other individuals. Having said that, Dumont failed to allege these other sources in the FAC. As such, the Court GRANTS WITHOUT PREJUDICE Goodheart's motion to dismiss the NIED cause of action.

2. Intentional Infliction of Emotional Distress

Goodheart moves to dismiss the third cause of action for intentional infliction of emotional distress ("IIED")

because Goodheart's conduct was privileged and because the alleged conduct was not extreme or outrageous as a matter of law. First, Goodheart argues the common-interest privilege bars Dumont's cause of action for IIED to the extent it arises from the defamation cause of action. For the same reasons as discussed above, Goodheart's first argument fails.

Second, Goodheart argues Dumont fails to show one of the elements necessary for an IIED claim: "outrageous conduct." Goodheart contends his conduct does not rise to this level because he was acting within what he understood to be the bounds of his role as County-retained psychiatrist, and his opinion was based on a comprehensive review of Dumont's medical background and interviews with Dumont. He also asserts such a level of "outrageousness" is not demonstrated by the fact that Dumont disagrees with Goodheart's findings which Goodheart then communicated to others.

To state a IIED claim, the conduct must be so extreme as to cause an average member of the community to exclaim, "Outrageous!" *Ess v. Eskaton Properties, Inc.*, 97 Cal. App. 4th 120 (App. 3 Dist. 2002). Dumont makes a number of allegations relevant to a determination of whether Goodheart's conduct was "outrageous": that the statements contained in the Offending Report were false and "damning", FAC at ¶ 27; that Goodheart went beyond the scope of his duties to render an opinion as to whether Dumont was psychologically disabled to opine about whether Dumont was physically disabled, *id.*; that Goodheart did so despite having never conducted a physical examination of Dumont and being unqualified to render opinions as to physical disability, *id.*; and that in doing so Goodheart acted with willful and conscious disregard of

the rights, health, well-being and safety of Dumont, *id.* at ¶ 31. There is no indication that a trier of fact would not find the conduct as alleged, to be "outrageous". Plaintiff, therefore, has alleged facts sufficient to withstand Goodheart's motion on these grounds. On this basis, the Court DENIES the motion to dismiss Dumont's IIED cause of action.

E. Section 1983 Violation

Goodheart argues Dumont has not affirmatively alleged Goodheart acted under color of law at the time of the offense, which is a basic requirement for stating a cause of action under Section 1983. *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000). Goodheart contends Dumont admitted Goodheart was acting on his own, as an independent contactor, and therefore, Goodheart could not have acted under color of law. DMD at 16.

The FAC states Dumont substantially complied with the claim requirements for his "tort claim against Defendant County and the individual county defendants – including Goodheart where sued in his *official capacity* (to the extent that he is *not* an independent contractor)." FAC at ¶ 82 (emphasis added). By alleging Goodheart may have acted in his capacity as an independent contractor *or* in his official capacity, Dumont pleads alternative theories. Where inconsistent counts are pled in the alternative, the legal sufficiency of each count presents a separate question, and it is not ground for dismissal that allegations in one count contradict those in another. *See McCormick v. Hopmann*, 161 N.E.2d 720 (Ill. App. 3 Dist. 1959). Dumont affirmatively alleges Goodheart was acting under "color of

law" by pleading in the alternative that he was acting in his "official capacity."

Goodheart also argues the doctrine of qualified immunity bars Dumont from suing Goodheart under Section 1983. Goodheart's primary argument is that the right to privacy allegedly violated was not clearly established at the time of the violation, such that a reasonable officer would not understand that what he was doing was violating that right. Goodheart points out that the status of law is unsettled as to whether disclosure of private information is constitutionally protected. In support he cites the following cases: *Whalen v. Roe*, 429 U.S. 589, 607 (1977), holding although prescription drug users in New York had a privacy interest in not having the state gather information about their drug use, this interest was outweighed by the state's interest in gathering the data; *United States v. Westinghouse*, 638 F.2d 570, 578 (3d Cir. 1980), holding that medical records of employees fell within one of the zones of privacy entitled to protection but even protected material could be required to produce or disclose upon a showing of proper governmental interest; *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981), holding that the Constitution does not encompass the general right to nondisclosure of private information; and *American Fed'n of Gov't Employees v. Dept of Housing and Urban Dev.*, 118 F.3d 786, 791-93 (D.C. Cir. 1997), expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of information," but declining to determine that such a right did not exist.

The two-pronged test for qualified immunity under Section 1983 asks whether: (1) the rights the officials allegedly violated was clearly established at the time of the violation; or (2) if a reasonable official would have

thought that the defendant's actions were constitutional. *See Conn v. Gabbert*, 526 U.S. 286, 295 (1999); *see Anderson v. Creighton*, 483 U.S. 635, 940 (1987) (holding that the existence of the right alleged must be sufficiently clear that a reasonable official would understand that what he is doing violates that right).

Although courts, as described above, have demonstrated reluctance in finding an absolute right to privacy with respect to the dissemination of certain information, Goodheart has not identified any decision which would preclude this Court from finding that a right existed with respect to medical information such as the information gathered by Goodheart here. Moreover, in *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 P.3d 1260 (9th Cir. 1998), the Ninth Circuit recognized the "constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality." *Id.* at 1269. Although inconclusive, the *Norman* court's pronouncement of a privacy interest supports Dumont's contention that, at least in the Ninth Circuit, a right to privacy with respect to the dissemination of medical information was sufficiently clear such that a reasonable official in Goodheart's position would have known the dissemination of Dumont's personal information violated Dumont's constitutional right to privacy of personal information.

Having found, in the context of this motion, the existence of a constitutional right to privacy of information, the Court must determine whether a legitimate government interest outweighs the alleged violation of this right. This Court was previously not persuaded that Goodheart had demonstrated a legitimate government interest in the dissemination of Dumont's private information. *See* March

Order at 11. Goodheart does not add anything to his argument which persuades the Court to vary from its earlier determination. Therefore, the "legitimate government interest" caveat does not preclude the finding of a violation and the Court DENIES Goodheart's motion to dismiss Dumont's Section 1983 cause of action.

F. Motion for a More Definite Statement

Goodheart moves, in the alternative, for a more definite statement under FRCP 12(e). Goodheart's argument is not supported by the legal standard for a FRCP 12(e) motion, which asks whether the pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. Goodheart, instead, bases his motion on the "long and . . . irrelevant, redundant or conclusory allegations" in the complaint and improperly relies on FRCP 8(e), which requires that each averment of a pleading be "simple, concise, and direct." While quite lengthy, he FAC is specific enough to apprise Goodheart of the substance of the claim being asserted. Goodheart's FRCP 12(e) motion for a more definite statement is therefore DENIED.

II. County Defendants' Motion to Dismiss

A. Equitable Tolling of the Statute of Limitations

Section 1983 does not contain its own statute of limitations; therefore, the Ninth Circuit applies the one-year statute of limitations of California Code of Civil Procedure section 340(3) to all actions brought under 42 U.S.C. § 1983 in California. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995). "[A] claim accrues

when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis*, 174 F.3d 987, 991-92 (9th Cir. 1999).

With its March Order, the Court granted, without prejudice, Defendant County's motion to dismiss the Section 1983 claims based on a statute of limitations challenge. *See* March Order at 14. The Court held Dumont was aware of the full extent of the injury which was the basis of the claim since at least as early as September 2000 when the original complaint was filed. *Id.* Thus, the statute of limitations would have expired at the latest in September 2001. *Id.* County Defendants were added in November 2001.

The motion was granted with leave to amend because Dumont asserted he was able to make allegations which demonstrates that his claim against County Defendants was timely. Dumont now avers the statute of limitations should be equitably tolled because of: (1) the five month discovery stay imposed in the state court due to Goodheart's heart attack; (2) the re-publication of the Offending Report, which extended the accrual date; and (3) complicity between Goodheart and the County to keep the County at arm's distance until the statute of limitations had expired.

The five month discovery stay is not valid grounds for equitable tolling. "It is a well recognized fact that the running of the statute of limitations is suspended during any period in which the plaintiffs legally prevented from taking action to protect his rights." *Santa Clara County v. Hayes Co.*, 43 Cal.2d 615, 618 (1954). County Defendants persuasively argue the court granted only a limited discovery protective order related to Defendant Goodheart.

See County Defendant Reply at 5. The discovery stay "did not . . . prohibit the Plaintiff from amending the Complaint to add additional Defendants." *Id.*

Second, Dumont contends that the inadvertent subsequent publication of the Offending Report to an insurance adjuster by one of the treating physicians constituted a continuing violation and thus extends the statute of limitations. FAC ¶ 34.[11] Courts have held each overt act that is part of the violation and that injures the plaintiff starts the statutory period riming again. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997). However, a mere continuing impact from past violations is not actionable. *Knox*, 260 F.3d at 1013. The inadvertent republication of the Offending Report is a continuing impact from past violations, especially given that the recent publication originated from a third party other than Defendants.[12] As

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[11] At oral argument Dumont brought to the Court's attention for the first time the Seventh Circuit case *Heard v. Sheaban*, 253 F.3d 316 (7th Cir. 2001), for the proposition that the continuing violation doctrine is an accrual doctrine. The *Heard* court held it is "not a tolling doctrine, because we don't want the plaintiff to sue before the violation is complete." *Id.* at 319. However, the Ninth Circuit in *Knox v. Davis*, 260 F.3d 1009 (9th Cir. 2001), treats the continuing violation doctrine as a tolling doctrine in Section 1983 claims. *See id.* at 1013. Because Dumont has not provided this Court with a Ninth Circuit case which, in contrast with *Knox*, treats the continuing violation doctrine as an accrual doctrine, this Court treats it as a tolling doctrine for the purposes of this motion.

[12] County Defendants also point out that the case law is unclear as to the scope of the application of the continuing violation doctrine, arguing that the doctrine only applies to employment discrimination cases. The Supreme Court and the Ninth Circuit have, however, applied the doctrine to Section 1983 cases which did not involve employment discrimination. *See, e.g., Klehr*, 521 U.S. at 189 (applying the continuing violation doctrine to price-fixing under anti-trust law); *Douglas v. Calif. Dept. of Youth Auth.*, 271 F.3d 812 (9th Cir. 2001)

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such, the Court finds Dumont's argument to the contrary unpersuasive.

Finally, although the claim of complicity would be valid to equitably toll the statute of limitations, Dumont does not allege sufficient facts to support his claim of complicity. Defendant alleges Goodheart was complicit "in keeping the County Defendants at bay," and points to Goodheart's initial refusal to allow Dumont to add the County Defendants to the complaint. This single factual allegation is insufficient to support a claim of "complicity." Still, although the allegations are insufficient as currently framed, it is unclear whether Dumont is able to allege any further facts in support of the "complicity" argument or whether Dumont could allege other claims to equitably toll the statute of limitations. The Court therefore, GRANTS WITHOUT PREJUDICE County Defendants' motion on these grounds.

B. California Tort Claims Act

County Defendants argue, to the extent the CTCA applies, Dumont does not meet the claim requirements. They argue Dumont did not comply with the CTCA section 910(e) requirement that the claim shall identify the names of the persons causing the injury.

Section 910(e) requires Dumont to name the employee(s) only if such information is known. *See* Cal. Gov't Code § 910(e) (stating "[t]he name or names of the public

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(applying the doctrine to violations of the ADA and Rehabilitation Act). Having said that, this Court need not decide whether an extension of the doctrine to the type of case at hand.

employee or employees causing the injury, damage, or loss, *if known.*") (emphasis added). Dumont alleges he did not know the names of persons involved or their roles at the time the SAC was filed. His failure to identify the persons causing the injury, therefore, is not a defect warranting dismissal.[13]

County Defendants also contend Dumont failed to meet the section 915(a) claim requirement, which states that the claim "shall be mailed to the clerk, secretary or auditor or to the governing body at its principle office." Cal. Gov't Code § 915(a). The substantial compliance doctrine requires a misdirected claim be "actually received" by the appropriate person. *Id.* at § 915(e).

In construing the requirement the court found, in *Life v. County of Los Angeles*, 227 Cal. App. 3d 894 (App. 2 Dist. 1991), that receipt by the Defendant county hospital's "legal department" did not amount to substantial compliance with the claim statute where there was no evidence to show that the claim was actually received by the appropriate person. *See Life*, 227 Cal. App. 3d at 901. In contrast, here, as contended by Dumont, the "legal department" in *Life* did not actually serve as the legal counsel to any of the appropriate persons, whereas the County Counsel does in fact serve as the primary legal adviser to the County Board of Supervisors, an appropriate person under section 915.[14] Moreover, it is undisputed

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[13] County Defendants farther argue Dumont failed to comply with CTCA Section 910. This argument mirrors Goodheart's arguments. As such, and for the same reasons stated above, the Court DENIES the motion on this ground.

[14] Dumont further argues substantial compliance based on the FAC allegation that Donovan forwarded the material to County Counsel for

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that Deputy County Counsel responded to the claims upon receipt of the materials. FAC at ¶¶ 80-81 and exhibits 4, 5. Given that County Defendants did not object to this contention at oral argument, the Court finds substantial compliance and DENIES motion to dismiss on these grounds.[15]

CONCLUSION

For the foregoing reasons, the Court GRANTS WITHOUT PREJUDICE Goodheart's motion to dismiss with respect to the negligent infliction of emotional distress cause of action. The Court DENIES Goodheart's motion to dismiss with respect to: (1) non-compliance with the California Tort Claims Act; (2) the defamation cause of action; (3) the privacy cause of action; (4) the intentional infliction of emotional distress cause of action; and (5) the section 1983 cause of action. The Court also DENIES Goodheart's motion for a more definite statement. With respect to County Defendant's motion, the Court GRANTS the motion WITHOUT PREJUDICE with respect to the statute of limitations charge and DENIES the motion WITHOUT PREJUDICE with respect to CTCA. Dumont shall file an amended complaint within twenty (20) days of this Order.

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the County of Marin which "by statute (Gov. Code § 26526) and by practice, acts as the primary legal adviser to the County Board of Supervisors." FAC at ¶ 79.

[15] The denial is WITHOUT PREJUDICE to further motions on the issue because Dumont only raised the distinction at oral argument.

IT IS SO ORDERED.

Dated: August 16, 2002

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK W. DUMONT, JR.,

Plaintiff,

v.

WILLIAM B. GOODHEART, M.D., et al.,

Defendants.

/

No. C 01-4921 MJJ

ORDER STRIKING FOURTH AMENDED COMPLAINT; DENYING PLAINTIFF'S MOTION FOR REMAND; GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Filed Mar. 22, 2002)

INTRODUCTION

Before this Court are three motions: a motion to remand filed by Plaintiff Frank W. Dumont ("Dumont"), a motion to dismiss filed by Defendant William B. Goodheart ("Goodheart") pursuant to Federal Rule of Civil Procedure 12(b)(6), and a motion to dismiss filed by Defendants County of Marin, Veronica Morgan, Miriam Rimkeit, Heidi Allgaier and Mary Donovan (collectively "County Defendants") pursuant to Federal Rule of Civil Procedure 12(b)(6). Having considered all of the papers submitted[1] and oral argument, the Court DENIES

[1] Together with their respective motions to dismiss, Goodheart and County Defendants request judicial notice of complaints filed in the same matter in state court before the case was removed to this Court. As such, they are public records in related or underlying cases which have a direct relation to the matters at issue and appropriate for judicial notice. *See MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (finding that the Court may take judicial notice of public records outside the pleadings); *see also In re American Continental Corp./Lincoln Savings and Loan Sec. Lit.*, 102 F.3d 1524, 1537 (9th Cir. 1996), *rev'd on other grounds by Lexecon. Inc. v. Milberg Weiss Bershad*

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Dumont's motion for remand, GRANTS Goodheart's motion to dismiss, and GRANTS County Defendants' motion to dismiss.

FACTUAL BACKGROUND

In April 2000, Dumont initiated suit in the Superior Court for the County of Marin against Goodheart, as an individual, alleging state law causes of action and a claim based on allegations of a violation of his right to privacy pursuant to both the state and federal constitutions. *See Frank W. Dumont v. William B. Goodheart, M.D.*, No. 00-2007 Superior Court for the County of Marin, Complaint. Dumont amended his complaint three times while in state court, each new version containing the same right of privacy claim. *See id.*, First Amended Complaint, Second Amended Complaint, and Third Amended Complaint.

Dumont's Third Amended Complaint ("TAC") sets forth six causes of action against Goodheart, as an individual, as follows:

> First Cause of Action: Defamation – Libel
> Second Cause of Action: Right of privacy based on state and federal statutory and constitutional rights.
> Third Cause of Action: Intentional and negligent infliction of emotional distress
> Fourth Cause of Action: Breach of confidential relationship

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Hynes & Lerach, 520 U.S. 26 (1998) (finding that courts may take judicial notice of "matters of public record, including court records in related or underlying cases which have a direct relation to the matters at issue" without converting the motion into one for summary judgment). Moreover, Dumont did not file any objections to the requests. Therefore, the requests for judicial notice are both GRANTED.

Fifth Cause of Action: Breach of physician/patient privilege
Sixth Cause of Action: Negligence

With his TAC, Dumont expanded the suit and added the Seventh Cause of Action under 42 U.S.C. § 1983, the basis of which is the previously identified six causes of action[2] and Dumont's right to privacy under the federal and state constitutions, against Goodheart, in his official capacity, and County Defendants. Dumont named Goodheart, in his official capacity, and the County Defendants for the first time in the TAC.

The gist of Dumont's allegations is that when Dumont applied for general assistance with Defendant Department of Health and Human Services of the County of Marin ("Department"), he underwent a psychiatric evaluation as part of the application process. Goodheart, a psychiatrist under contract with Defendant County of Marin ("County"), was assigned to perform the evaluations and prepared reports which, according to Dumont, contained "a multitude of damning and libelous statements. . . . " TAC at ¶ 27.[3] Thereafter, Dumont asserts that Goodheart

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[2] Under each heading for each state law cause of action, the TAC states that the state law claims are being made against "all DEFENDANTS, including GOODHEART, each in his/her official capacity via 42 Section 1983." TAC, *passim*.

[3] Dumont complains most vociferously about one particular report, namely the report issued on October 28, 1999, referred to by Dumont in the TAC as the "Offending Report," which "consistently conclud[ed] that [Dumont] was not entitled to [g]eneral [a]ssistance *on any ground* and that [Dumont's] complaints of severe, disabling pain emanating from several points in his body were not *credible* despite the objective evidence . . . " otherwise. TAC at ¶ 27. The Offending Report contained, according to Dumont, the following examples of libelous statements: (1) Dumont "has had a 'probable narcotic dependence since the age of 18;' "

(Continued on following page)

disseminated the opinions to County Defendants, and Goodheart and County Defendants disseminated the opinions to other entities, such as the Social Security Administration and Veterans Administration, from which Dumont was seeking further assistance. *See id.* at ¶¶ 37-46. As a result of the dissemination, Dumont claims to have suffered injuries, such as humiliation and denial of benefits to which he was otherwise entitled. *See id.* at ¶ 46.

On December 14, 2001, Goodheart removed the action to this Court. Dumont now brings a remand motion and Goodheart and County Defendants each bring a separate motion to dismiss.[4]

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(2) Dumont "has habitually, and impliedly illegally, obtained narcotics from sources other than the medical doctors; and (3) Dumont "is a 'homosexual.'" *Id.* at ¶ 36.

[4] In response to both motions to dismiss, Dumont claimed to have filed a fourth amended complaint ("FAC"). Dumont, however, did not file the FAC until the morning of the hearing on this matter. As such, the Court was unable to determine whether the amendment rendered the motions moot. Moreover, Dumont filed the FAC without stipulation or leave to amend and instead relying, Dumont states, on Federal Rule of Civil Procedure 15(c). Rule 15(c) pertains to relation back and the Court is unclear as to its relevance. Rule 15(a) is the relevant rule, stating that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . " Dumont, however, now files a complaint which has been amended a total of four times. The operative word in Rule 15(a) is "once" and here, clearly, Dumont has exceeded the one-time right to amend. Moreover, the Rule only allows a party to amend as a matter of course *before* a responsive pleading is served. Although County Defendants have not filed a responsive pleading, Goodheart has, having answered Dumont's second amended complaint while in state court. Because the claims pled in the proposed FAC are all against Goodheart, there is no indication that the FAC would have only constituted an amendment against County Defendants, which might have been permissible under Rule

(Continued on following page)

ANALYSIS

I. Motion for Remand

Dumont urges the Court to remand this action to the Marin County Superior Court on the following grounds: (1) the notice of removal was defective because the Department did not join in or consent to the removal; (2) Dumont could not have filed the action in federal court in the first instance because the Department is a state entity subject to the protection of the Eleventh Amendment; and (3) Goodheart waived his right to removal by availing himself of the state court's jurisdiction after opposing Dumont's motion to add a punitive damages claim to the complaint in state court. The Court addresses each of the grounds in turn below.

A. Failure to Join Department

Plaintiff here seeks remand because the Department did not join in the removal. Defendants counter Dumont's allegation regarding Department's failure to join the removal by stating that Department is a county entity for the County of Marin, and therefore, joined the removal upon the joinder of County. In support, County Defendants cite to California Government Code section 811.2 which defines "public entity" to include a county and its

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15(a) because County Defendants were newly added and had not yet filed a responsive pleading. As such, Dumont is not entitled to amend the complaint as a matter of course. Finally, Dumont, in a footnote, requests that the Court consider his opposition as a motion for leave to amend to the extent the Court finds the filing, as a matter of course, improper. He provides no argument in support of his motion, and, on that basis, the Court DENIES the motion and STRIKES the FAC from its docket.

agencies as authority for the proposition that the County and the Department are not separate public entities. Moreover, Defendants assert that even Plaintiff, in his Third Amended Complaint ("TAC"), associates the Department and the County as one in the same. *See* TAC at ¶ 5 (alleging that the County is the governing body responsible for the lawful operation of, among other things, the Department).

All defendants must generally join in a removal notice, and the removing party has the burden to explain the absence of any co-defendants. *See* 28 U.S.C. § 1446(a); *Prize Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999). Having explained that the Department joined the removal with the County's joinder, the Court finds that Defendants did all join the removal and removal was not defective. Therefore, the Court DENIES Dumont's motion on this ground.

B. Eleventh Amendment

Dumont argues that the Department, as a state agency, might enjoy Eleventh Amendment immunity from suit in federal court. As such, according to Dumont, he could not have brought the case originally in federal court and Defendants are not entitled to removal. Dumont cites to *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381 (1998) for the proposition that because the Department might enjoy Eleventh Amendment immunity from suit in federal court, removal was improper.

Defendants counter that the TAC is devoid of any allegation that the Department is a state agency, and instead includes allegations that it is a county agency. In addition, Defendants argue that the Department, as a

county agency, does not enjoy immunity under the Eleventh Amendment. Even if it did, Defendants continue, the fact that the Department may claim immunity over the Section 1983 claim does not preclude the Court from hearing the non-barred claims as is expressly contemplated, according to Defendants, in *Schacht*, the case cited by Dumont.

Dumont retorts that Defendants fail to show that the Department is not a state agency and that, on information and belief, the Department might somehow be a state actor. Dumont further contends that Defendants are incorrect in their interpretation of *Schacht* in that a prerequisite to the case remaining in federal court when there is a potential Eleventh Amendment bar is that jurisdiction otherwise exists and, here, according to Dumont, should the Department invoke the Eleventh Amendment, the immunity would preclude Dumont from bringing the Section 1983 claim against County Defendants and there would be no alternative basis for jurisdiction.

The Court disagrees with Dumont as to his interpretation of *Schacht*. An explanation, however, is unnecessary since according to Dumont and his allegations in the TAC, the Department is a county agency.[5] *See e.g.* TAC at ¶ 5 (alleging that the County is the governing body responsible for the lawful operation of, among other things, the Department). Because the TAC lacks any allegation that

[5] Moreover, in their papers, Defendants assert that the Department is not a state agency. *See* Goodheart Opposition to Remand Motion at 3; County Defendant Opposition to Remand Motion at 3-4. They confirm the same at the hearing, stating that they are not entitled to immunity under the Eleventh Amendment.

the Department is a state agent, it is unclear, on the face of the TAC, that the Department was entitled to immunity under the Eleventh Amendment. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977) (stating that Eleventh Amendment immunity does not extend to county, and or similar county or municipal entities). The Court finds the same with respect to all remaining County Defendants. Because there is no concern that the TAC contains an Eleventh Amendment-barred claim which destroys removal jurisdiction, the Court DENIES Dumont's motion on this ground.

C. Goodheart's Waiver Through Conduct

Dumont moves for remand on the basis that Goodheart, having opposed Dumont's motion to add a punitive damages claim, consented to the state court's jurisdiction and waived his right to remove. Goodheart counters that his conduct was insufficient to constitute waiver.

"A party . . . may waive the right to remove to federal court where, after it is apparent that the case is removable, the defendant takes action in state court that manifest his or her intent to have the matter adjudicated there, and to abandon his or her right to a federal forum." *Resolution Trust Corp. v. Bayside Develop.*, 43 F.3d 1230, 1240 (9th Cir. 1994). "A waiver of the right of removal must be clear and unequivocal. In general, the right of removal is not lost by action in the state short of proceeding to adjudication of the merits." *Id.*

Here, Dumont contends Goodheart waived his right to remove on grounds that Goodheart opposed Dumont's motion to add a punitive damages claim. Dumont does not allege that Goodheart took any affirmative action in state

court, a necessary requirement in finding waiver. *Compare Resolution Trust*, 43 F.3d as 1240 (finding the defendant's defensive action to avoid entry of judgment insufficient to constitute waiver); *Bedell v. H.R.C. Ltd.*, 522 F. Supp. 732, 738 (E.D. Ky. 1981) (quoting 1A Moore's Federal Practice § 0.157(9) at 127 (stating "that although waiver of the right of removal is possible, 'the defendant's intent [to waive] must be clear and unequivocal. Waiver will not occur by defensive action in the state court, short of proceeding to an adjudication on the merits.'")) *with Jacko v. Thron Americas, Inc.*, 121 F. Supp. 2d 574, 576 (E. D. Tex. 2000) (holding that the defendant's filing and litigation of a summary judgment motion in state court constituted waiver); *George v. Al-Saud*, 478 F. Supp. 773, 774 (N.D. Cal. 1979) (hypothesizing that had the defendant filed a counterclaim after the case was removable and before seeking removal, the filing "may" constitute a waiver); *Baldwin v. Perdue, Inc.*, 451 F. Supp. 373, 375-76 (E.D. Va. 1978) (finding that filing of a cross-claim by the defendant constituted waiver).

The fact that Goodheart opposed Dumont's motion to add punitive damages claims, therefore, did not manifest an intent to litigate in state court, and such conduct, without more, does not constitute waiver. As such, the Court finds that Goodheart did not waive his right to remove in light of having opposed Dumont's motion to add a claim for punitive damages and DENIES Dumont's motion on this ground.

D. Untimely Removal

For the first time in his reply, Dumont argues that Goodheart could not remove the case as "[his] right was

waived long ago because [the cause of action for breach of privacy under both the state and federal Constitution] was asserted in the original, the first and the second amended complaints" and Goodheart did not remove the case until Dumont filed the TAC, which added the Section 1983 claim against Goodheart in his official capacity and County Defendants, who were named for the first time in the TAC. Reply at 3:13-4:5. In support, Dumont cites to *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 293, 291 (1938), for the proposition that Goodheart lost his right to remove the case when he failed to remove until the TAC despite being able to earlier.

Having made the argument, however, Dumont continued that "[t]he fact that the wrong defendant removed, rather than joined, seems to be irrelevant, though, because it could have been done the other way – with the County Defendants removing and Goodheart joining. . . . " Reply at 3:22-4:1. When asked at the hearing by the Court whether Dumont intended, by characterizing the argument as "irrelevant," to waive his right to remand on this ground, Dumont advised the Court that he did not. *See Ford v. New United Motors Manuf., Inc.*, 857 F. Supp. 707 (N.D. Cal. 1994) (stating that failure to timely file renders removal procedurally defective, and that such defects are modal or formal and may be waived) (internal citations omitted).

Because the argument was raised for the first time in Dumont's reply, the Court allowed the parties to submit further briefing on the issue. Goodheart argued that the original complaint did not constitute a basis upon which he could remove the case and that Dumont waived his right to remand on this ground because he first made the

argument in his reply, which was filed after the time for seeking remand on a procedural defect had expired.[6]

A district court has no authority to remand a case to state court on the basis of a defective removal raised for the first time in a reply filed more than thirty (30) days after the filing of the notice of removal, regardless of whether a motion for remand was timely filed. *See Counsel of Laborers v. Pittsburgh-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995). Here, Dumont raised, for the first time, his objection in his reply to the remand motion.[7] Dumont filed the reply on February 19, 2002. Goodheart filed the removal notice on December 14, 2001. Over two months had passed before Dumont objected to the procedurally defective removal. As such, the objection was waived. *See Counsel of Laborers*, 69 F.3d at 1038. Dumont's motion, therefore, is DENIED.[8]

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[6] Defendants state that the Court *sua sponte* raised the defect at the hearing for the motions. This is an inaccurate characterization of the events that transpired during the hearing for the motions.

[7] Dumont attempts to argue, in his supplemental briefing, that he raised the issue for the first time in the moving papers by arguing that Goodheart had waived his right to remove when he conducted himself in a manner which manifested his intent to have the manner adjudicated in state court. Specifically, Dumont states that "[t]hough raised in the context of waiving his right to remove after the [TAC] was filed (by opposing a motion to add punitive damage remedies to the complaint), the same principle applies to Goodheart's actions in filing motions to strike and dismiss, and an answer, *after* the first opportunity to remove arose following the filing of the [FAC] in 2000 – which principle was fleshed out in [Dumont's] reply." The Court does not construe Dumont's motion papers in such a generous manner and finds that the first time Dumont made the objection on grounds of procedurally defective removal was in his reply.

[8] Consequently, Dumont's request for fees is DENIED.

II. Goodheart's Motion to Dismiss

Goodheart seeks dismissal for failure to state a claim, arguing that Dumont failed to plead the existence of a constitutional violation in its Section 1983 claim. In addition, Goodheart contends that Dumont failed to comply with requirements of the Tort Claims Act in pleading his state law claims, and Dumont's fourth, fifth and sixth causes of action are barred because a physician/patient relationship did not exist between Dumont and Goodheart.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims asserted in the complaint. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337 (9th Cir. 1996). Dismissal of an action pursuant to Rule 12(b)(6) is appropriate only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1482 (9th Cir. 1991). The Court will dismiss the complaint or any claim in it without leave to amend only if "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). With this standard in mind, the Court addresses each argument in turn below.

A. Section 1983

Goodheart seeks dismissal for failure to state a claim, arguing that Dumont failed to plead the existence of a federal right or a constitutional violation in its Section 1983 claim. Specifically, Goodheart argues that Dumont fails to identify the source from which his right of privacy emanates. In addition, Goodheart argues that he cannot

be liable because he disclosed the reports for legitimate government purposes. Finally, in his reply, he argues that he, and all other Defendants are entitled to qualified immunity.

1. Source of Right to Privacy

Dumont purports to identify the source of his right to privacy claimed violated by transcribing a litany of state statutes, namely portions of California Health and Safety Code, the California Civil Code, the California Government Code, the California Welfare and Institutions Code. *See* Dumont's Opposition to Defendants' Dismissal Motions ("Dms. Opp.") at 4-7, 8. In addition, he identifies and transcribes portions of notices and the Manual of Policy and Procedures from the California Department of Social Services. *See id.* at 7-8. He further quotes extensively from the Privacy Act of 1974, 5 U.S.C. § 552a, and the confidentiality provisions relating to the Veterans Administration medical records, and 38 U.S.C. §§ 5701(a) and 7332(a)(1). *See id.* at 7-8. He also lists "The ***Constitutions*** of the State of California and the United States of America" as a source. *Id.* at 5 (emphasis in original). At the end of the list, Dumont states "both the U.S. Constitution and the federal statutes can serve as a basis for an alleged section 1983 violation[9] and the federal privacy statutes noted above . . . were all violated by the actions alleged to have been engaged in by all Defendants. . . . " *Id.* at 10.

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[9] Having acknowledged understanding that Dumont must identify violations of rights pursuant to the federal Constitution or federal statutes to maintain a Section 1983 claim, the Court is at a loss as to why Dumont continued *ad nauseam* to identify various California code sections.

Moreover, in response to Goodheart's argument that Dumont failed to identify a right violated, Dumont inserts extensive quotations of federal and state case law discussing generally the right to privacy as a right among the penumbrae of rights protected by the Constitution. *See* Dms. Opp. at 10-11. He then concludes by stating that "[s]o there is no question that the federal Constitution, in addition to the statutes referenced above, provide ample basis for a § 1983 action under the circumstances o [sic] this case." *Id.* at 12.

To establish a prima facie case under § 1983, the party must demonstrate that the action occurred "under color of law," and resulted in a deprivation of a constitutional or federal statutory right. *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000). Goodheart does not dispute that he acted "under color of law," and instead disputes whether Dumont has identified a constitutional or federal statutory right violated. Dumont responds by transcribing excerpts from various state and federal statutes but then does not apply those provisions to the facts alleged in the TAC. Moreover, the Court is unclear as to the relevance of the excerpts from cases to which Dumont cites in that they discuss either the right of privacy in general, privacy rights under the California Constitution, or a right to privacy with respect to specific medical information. His response, therefore, is unhelpful.

Having said that, Dumont has alleged that his § 1983 claim is based upon violations of the right to privacy accorded him through the federal constitution and various federal statutes. The right to privacy does indeed exist. Dumont, therefore, has sufficiently alleged a source of his rights. The identified source, however, only goes to the § 1983 claim as it relates to the allegations of the violation

to his right to privacy, namely, the Second Cause of Action. The other causes of action for, among other things, defamation, is not premised on a violation of his right to privacy. Still, Dumont relies on the other causes of action as a basis for his § 1983 claim. *See* TAC, *passim* (stating that the state law claims are being made against "all DEFENDANTS, including GOODHEART, each in his/her official capacity via 42 Section 1983."). Indeed, the Court is unclear as to the source of the § 1983 claim as it is premised on state law violations, and Dumont has not shed any light on the issue through his opposition. As such, the Court strikes reliance on the First, Third, Fourth, Fifth, and Sixth Causes of Action as support for the § 1983 claim.

2. Legitimate Government Purposes

Goodheart also moves to dismiss the TAC on grounds that even if Dumont had identified a constitutional right, the right to informational privacy is not absolute and may be infringed upon a showing of proper governmental interest. According to Goodheart, Defendants had a legitimate interest in disseminating the Offending Report as pertinent information to Dumont's condition for other government agencies to which Dumont was applying for assistance as it served the public purpose of ensuring that Dumont met the proper eligibility requirements. Moreover, Goodheart asserts the exchange of information between government agencies helps prevent misuse of the local and federal public welfare systems, fraudulent claims for benefits, and duplication of investigative efforts. Finally, Goodheart argues that any disclosure was made to others in their professional context and each had a duty to maintain

confidentiality. Dumont counters that by arguing that "there was some compelling state interest that justified the multiple violations federal and state Constitutional principals and statutes directly on point. [Defendants] go way beyond the allegations of the complaint and into Defendants' alleged *motives* for circulating the offending report outside of the context of the General Assistance offices." Dms. Opp. at 12.

The Supreme Court stated, in dicta, that statutes authorizing the collection and utilization of sensitive personal information may be justified in some circumstances and is accompanied by concomitant statutory or regulatory duty to avoid unwarranted disclosures. *See Whalen v. Roe*, 429 U.S. 589, 879 (1976) (stating that there is a right to collect and use personal data for certain public purposes but not reaching the issue because that New York statute authorizing the accumulation of personal information in government files did not establish an invasion of any right or liberty protected). Here, there is no indication that Defendants were authorized to disclose their findings to third parties such as the Social Security Administration or Veterans' Administration. Indeed, the TAC explicitly states that the disclosures were "unauthorized." TAC at ¶¶ 28-30. Moreover, even if there were some authority to disclose the information, there is no indication that the practice was implemented to serve the interests identified by Goodheart, or that the interested identified are actually served by the practice. As such, the Court is not persuaded by the record before it that the disclosures made by Goodheart were justified as a matter of law.

3. Qualified Immunity

Goodheart claims to be entitled to qualified immunity for his conduct. The defense of qualified immunity protects public officials name as defendants in Section 1983 actions from liability for civil damages when performing discretionary functions unless such conduct violates a clearly established constitutional rights [sic] of which the defendants would have known. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In determining whether Goodheart is entitled to qualified immunity, the Court must determine whether Goodheart's conduct violated a clearly established constitutional right and, if so, whether Goodheart's conduct was objectively reasonable. *See Saucier v. Katz*, ___ U.S. ___, 121 S.Ct. 2151, 2156-59 (2001).

a. Conduct Violated Clearly Established Constitutional Right

Although the Court has stated above that Dumont identified a source for his right to privacy, there is nothing in his opposition which would indicate or demonstrate that Dumont has a clearly established constitutional right not to have his medical records prepared in connection with his application for general assistance disseminated to other agencies which are going to be determining whether Dumont is qualified for benefits. There is no indication, therefore, that Goodheart's conduct violated a clearly established constitutional right. The Court, therefore, GRANTS Goodheart's motion on his ground and the Section 1983 claim is DISMISSED WITHOUT PREJUDICE because Goodheart has not established that Dumont is unable to cure the deficiencies.

b. Objectively Reasonable

As discussed above in the context of whether there was a legitimate government purpose for the dissemination, there is no indication that the dissemination of material was objectively reasonable. Therefore, had it been necessary to reach this issue, the Court would have denied the motion on this ground.

B. Tort Claims Act

Goodheart contends that Dumont failed to comply with requirements of the Tort Claims Act in pleading his state law claims. Dumont does not oppose this portion of the motion, and instead "suggest, and requests, that the Court defer decision on the motions to dismiss until the defendants have a chance to consider – and respond to – the [FAC] that was filed after these motions were filed with this Court. . . ." Dms. Opp. at 14.[10]

As a general statutory requirement, a state law action for money or damages may not be maintained against a public entity or its employee unless a written claim has first been timely presented to the defendant and rejected in whole or in part. *See* Cal. Gov't Code §§ 905, 905.2, 945.4; *see Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 627 (9th Cir. 1988). Presentation of a claim is a

[10] In his TAC, however, Dumont argues that he is able to bring his Section 1983 claim without complying with the Tort Claims Act and relies on *Green v. City of Tucson*, 255 F.3d 1086, 1102 (9th Cir. 2001) for the proposition that he need not exhaust state remedies before proceeding with an action against public entities. Dumont's reliance on the case is misplaced as the *Green* court stated only that the plaintiff has no duty to exhaust state administrative remedies before pursuing a § 1983 claim, as opposed to state law claims, in federal court. *See id.* at 1102.

mandatory prerequisite to maintaining a cause of action against a public entity and failure to file a claim is fatal to the claimant's causes of action. *See Janis v. State Lottery Comm'n*, 68 Cal. App. 4th 824, 832 (1998). Joined causes of action in federal court based on state law tort claims are subject to dismissal unless the claims-filing requirements have been complied with concerning those causes of action. *See Karim-Panahi*, 839 F.2d at 627.

Here, the TAC contains no allegation that Dumont made a written claim to Defendants. Indeed, Dumont states "[a]lthough [Dumont] has not exhausted his administrative remedies vis-a-vis the County Defendants, he need not do so as a prerequisite to a section 1983 case [sic] of action. . . . " TAC at ¶ 83. The requirement still exists with respect to the state law causes of action made by Dumont against Goodheart, as an individual. As such, the Court GRANTS Dumont's motion and DISMISSES all state law causes of action, namely, the First, Second, Third, Fourth, Fifth and Sixth Causes of Action. This dismissal with respect to the First, Second and Third Causes of Action is WITHOUT PREJUDICE because the Court is unclear as to whether Dumont is able to allege compliance with the Tort Claims Act. The Fourth, Fifth and Sixth Causes of Actions are discussed further below.

C. Physician/Patient Relationship

Goodheart argues that Dumont's Fourth, Fifth and Sixth Causes of Action are barred because they are premised on the existence of a physician/patient relationship, and none existed between Dumont and Goodheart. Dumont does not respond to this argument.

When a physician examines a person for purposes other than as part or for the purpose of medical treatment, then there is no physician/patient relationship. *See e.g. Felton v. Schaeffer*, 229 Cal. App. 3d 229, 235-36 (1991) (finding no physician/patient relationship was formed by the physician's examination of the plaintiff on behalf of an employer for the purpose of determining whether the plaintiff was fit to work); *Keene v. Wiggins*, 69 Cal. App. 3d 308, 313 (1977) (finding no physician/patient relationship formed by physician's examination of the plaintiff on behalf of the employer's workers' compensation carrier for the purpose of determining whether the plaintiff qualified for workers' compensation.). Without such a relationship, the physician can only be liable for injuries occurring during the examination itself. *See Felton*, 229 Cal. App. 3d at 236. Misdiagnosis is not the basis of liability without a physician/patient relationship.

Here, according to the TAC, the Department sent Dumont to Goodheart for the purpose of determining whether Dumont was eligible for general assistance. Dumont does not allege that he hired Goodheart independently, or that Dumont suffered any injury except that which stemmed from the alleged misdiagnosis. As such, the Court GRANTS Goodheart's motion as to the Fourth, Fifth and Sixth Causes of Action WITHOUT LEAVE TO AMEND because there is no possibility Dumont can cure the deficiencies.

III. County Defendants' Motion to Dismiss

County Defendants seek dismissal on the same basis as Goodheart. In addition, County Defendants argue that Dumont's claims against County Defendants are barred by

the statute of limitations, having accrued more than one year prior to the filing of Dumont's TAC and because the TAC does not relate back to the date of filing. Moreover, County Defendants argue that they are immune from punitive damages.

A. Statute of Limitations

Section 1983 does not contain its own statute of limitations; therefore, the Ninth Circuit applies the one-year statute of limitations of California Code of Civil Procedure section 340(3) to all actions brought under 42 U.S.C. § 1983 in California. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995). "[A] claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Tworivers v. Lewis*, 174 F.3d 987, 991-92 (9th Cir. 1999).

County Defendants argue by having filed the TAC, which included County Defendants for the first time in November 2001, Dumont's causes of action are untimely. County Defendants argue that time began to accrue when Goodheart disseminated the Offending Report, which occurred, according to Dumont sometime in December 1999. *See TAC* at ¶ 75. In the alternative, time started when Dumont initiated suit against Goodheart in April 2000 since Dumont premises his allegations against the County on Goodheart's conduct, or, at the very latest in September 2000 when Dumont filed the First Amended Complaint containing the allegations that, among other things, an "employee of [the Department] forwarded [Goodheart's] report to the federal Social Security Department." *See* First Amended Complaint ("FAC") at ¶ 26. As such, according to County Defendants, time to bring

suit against [sic] would have expired, in September 2001, at the latest.

Having reviewed the FAC, it would appear that Dumont was aware of the full extent of the injury which is the basis of the claim since at least as early as September 2000, the date Dumont filed the FAC, if not earlier. As such, time would have accrued as of September 2000. Because the statute of limitations for § 1983 claims are one year, the time to have filed against County Defendants would have expired in September 2001. Dumont did not respond to the issue of whether the time to accrue could have started at any time other than those identified by County Defendants. Accordingly, the Court GRANTS County Defendants' motion to dismiss the § 1983 claim. The dismissal, however, is WITHOUT PREJUDICE because Dumont asserts that he is able to make allegations which demonstrates that his claim against County Defendants is timely.

B. Punitive Damages

County Defendants seek to strike claims for punitive relief. Public entities and their employees are immune from liability for punitive damages under Section 1983. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 217 (1981) (finding that public entities, and their employees, are immune from liability for punitive damages under Section 1983). Dumont does not oppose County Defendants' arguments that no such damages are permitted. As such, to the extent necessary, the Court GRANTS County Defendants' motion with respect to the punitive damages claim WITHOUT LEAVE TO AMEND.

CONCLUSION

For the foregoing reasons, the Court STRIKES Dumont's fourth amended complaint, as filed on March 12, 2002. The Court DENIES Dumont's motion for remand. The Court GRANTS WITH LEAVE TO AMEND Goodheart's motion to dismiss with respect to Dumont's § 1983 Claim, and the First, Second, and Third Causes of Action. The Court GRANTS Goodheart's motion to dismiss and DISMISSES WITH PREJUDICE Dumont's Fourth, Fifth and Sixth Causes of Action. The Court GRANTS WITH LEAVE TO AMEND County Defendant's motion to dismiss with respect to Dumont's § 1983 claim against County Defendants. The Court STRIKES the prayer for relief for punitive damages against COUNTY DEFENDANTS. Dumont shall file his amended complaint within twenty (20) days of this Order.

IT IS SO ORDERED.

Dated: March 21, 2002

/s/ Martin J. Jenkins
MARTIN J. JENKINS
UNITED STATES
DISTRICT JUDGE